No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

(VOLUME 1)

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 20, 2015
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 15-40238

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF TENNESSEE; AND STATE OF NEVADA,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION; RONALD D. VITIELLO, DEPUTY CHIEF OF U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER OF PROTECTION; SARAH R. SALDANA, DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; AND LEON RODRIGUEZ, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES,
DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
2/23/15	US CIVIL CASE docketed. * * *
	* * * * *
3/12/15	OPPOSED MOTION for stay pending appeal [7863057-2] Ruling is requested by: 03/26/2015. * * *
	* * * * *
3/12/15	OPPOSED MOTION to expedite the appeal [7863410-2], for leave to use appendix on appeal [7863410-3]. * * *
	* * * * *
3/13/15	RESPONSE/OPPOSITION filed by [appellees] * * * to the motion to expedite appeal * * *
	* * * * *
3/16/15	REPLY filed by Appellants * * *
	* * * * *
3/23/15	RESPONSE/OPPOSITION filed by [appellees] * * * to the motion for stay pending appeal * * *.
	* * * * *
3/24/15	COURT ORDER that appellants' partially opposed motion to expedite the appeal is GRANTED * * *
	* * * * *
3/30/15	APPELLANT'S BRIEF FILED * * *
	* * * * *

DATE	PROCEEDINGS
4/6/15	AMICUS CURIAE BRIEF FILED by Ms. Jane Doe #3, Ms. Jane Doe #2 and Ms. Jane Doe #1. * * *
	* * * * *
4/14/15	RESPONSE/OPPOSITION (FILED ON DOCKET AS SUPPLEMENTAL BRIEF ON MOTION FOR STAY PENDING APPEAL) filed by [appellees] * * * to the motion for stay pending appeal filed by Appellants * * *
	* * * * *
4/17/15	ORAL ARGUMENT HEARD before Judges Smith, Elrod, Higginson. * * *
	* * * * *
5/4/15	APPELLEE'S BRIEF FILED. * * *
	* * * * *
5/18/15	APPELLANT'S REPLY BRIEF FILED * * *
	* * * * *
5/26/15	NON DISPOSITIVE PUBLISHED OPINION FILED. Judge: JES , Judge: JWE , Judge: SAH. Denying motion for stay pending appeal filed by Appellants * * *
	* * * * *
6/4/15	ORAL ARGUMENT panel has requested of the parties the following: supplemental briefs. Miscellaneous due on 06/18/2015 for Appellees * * * and Appellants * * *

DATE	PROCEEDINGS
	* * * * *
6/18/15	APPELLEE'S SUPPLEMENTAL BRIEF FILED * * *
6/18/15	APPELLANT'S SUPPLEMENTAL BRIEF FILED. * * *
	* * * * *
6/29/15	ORAL ARGUMENT panel has requested of the parties the following: letter briefs. Miscellaneous due on 07/02/2015 for Appellees * * * and Appellants * * *
7/2/15	APPELLEE'S SUPPLEMENTAL BRIEF FILED * * *
7/2/15	APPELLANT'S SUPPLEMENTAL BRIEF FILED. * * *
7/6/15	APPELLANT'S SUPPLEMENTAL BRIEF FILED in response to the Appellees' letter brief of July 2, 2015. * * *
7/6/15	APPELLEE'S SUPPLEMENTAL LETTER BRIEF FILED in response to Appellant's supplemental letter brief filed July 2, 2015. * * *
7/10/15	ORAL ARGUMENT HEARD before Judges King, Smith, Elrod. * * *
	* * * * *
11/9/15	PUBLISHED OPINION FILED. * * *
11/9/15	JUDGMENT ENTERED AND FILED. [15-40238] (JMA)

DATE	PROCEEDINGS
11/18/15	MOTION by Jane Doe # 1, Jane Doe # 2, and Jane Doe # 3, in light of this Court's ruling in parallel case No. 15-40333 reversing denial of intervention and for purposes of participating as parties in further appellate proceedings, to intervene, on behalf of Jane Doe # 1, Jane Doe # 2, and Jane Doe # 3. * * *
11/19/15	COURT ORDER granting motion to intervene in the appeal No. 15-40238 [8062586-2] by Jane Doe # 1, Jane Doe # 2 and Jane Doe # 3 in 15-40238 Judge(s): JES. [15-40238] (ADB)
	* * * * *
11/25/15	REVISED PUBLISHED OPINION FILED. [8054922-2] [15-40238] (JRS)
1/4/16	MANDATE ISSUED. Mandate pull date satisfied. [15-40238] (RJd)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Docket No. 1:14-cv-00254

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA; AND STATE OF TENNESSEE, PLAINTIFFS

v.

UNITED STATES OF AMERICA; JEH JOHNSON, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION; RONALD D. VITIELLO, DEPUTY CHIEF OF U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER OF PROTECTION; SARAH R. SALDANA, DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; AND LEON RODRIGUEZ, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/3/14	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0541-14130337) filed * * *
		* * * * *
12/4/14	5	Opposed MOTION for Preliminary Injunction * * *
		* * * * *
12/9/14	14	First AMENDED Complaint against All Defendants filed * * *
		* * * * *
12/24/14	38	RESPONSE in Opposition to 5 Opposed MOTION for Preliminary Injunction, filed by [defendants] * * *
		* * * * *
1/7/15	64	REPLY in Support of 5 Opposed MOTION for Preliminary Injunction, filed by [plaintiffs] * * *
		* * * * *
1/14/15	91	MOTION to Intervene by Jane Doe # 1, Jane Doe # 2, Jane Doe # 3, filed. * * *
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/23/15	115	SUPPLEMENT to 14 Amended Complaint/Counterclaim/ Crossclaim etc.,, by [plaintiffs] * * *
		* * * * *
1/30/15	130	SURREPLY to 5 Opposed MOTION for Preliminary Injunction, filed by [defendants] * * *
		* * * * *
2/2/15	132	SUPPLEMENT to 5 Opposed MOTION for Preliminary Injunction by [plaintiffs]
		* * * * *
2/11/15	141	ORDER denying 91 MOTION to Intervene by Jane Doe # 1, Jane Doe # 2, Jane Doe # 3. * * *
		* * * * *
2/16/15	144	ORDER granting 5 Motion for Preliminary Injunction. * * *
2/16/15	145	MEMORANDUM OPINION AND ORDER (Signed by Judge Andrew S. Hanen) * * *
		* * * * *
2/23/15	149	NOTICE OF APPEAL * * *
2/23/15	150	MOTION *to Stay the Court's February 16, 2015 Order Pending*

DATE	DOCKET NUMBER	PROCEEDINGS
		Appeal (Emergency/Expedited) * * *
		* * * * * *
3/3/15	175	RESPONSE in Opposition to 150 MOTION to Stay *the Court's February 16, 2015 Order Pending Appeal (Emergency/Expedited)* * * *
3/3/15	176	ADVISORY by [defendants] filed. * * *
		* * * * * *
3/9/15	190	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 141 Order on Motion to Intervene by Jane Doe #1, Jane Doe #2, Jane Doe #3 * * *
		* * * * * *
3//15	203	TRANSCRIPT re: Motion hearing held on 3/19/15 before Judge Andrew S. Hanen. * * *
		* * * * * *
4/7/15	225	ORDER denying 150 Motion to Stay. * * *
4/7/15	226	ORDER regarding 183 Opposed MOTION for Discovery. * * *
		* * * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/7/15	247	ADVISORY by [defendants]
		* * * * *
7/9/15	282	ADVISORY by [defendants] filed. * * *
		* * * * *
8/21/15	299	TRANSCRIPT re: Hearing held on 8-19-15 before Judge Andrew S. Hanen. * * *
		* * * * *
11/23/15	311	Joint MOTION to Stay *Merits Proceedings Pending Resolution of Supreme Court Review* * * *
		* * * * *
12/15/15	320	ORDER 311 Joint MOTION to *Stay Merits Proceedings Pending Resolution of Supreme Court Review.* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-254

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; ATTORNEY GENERAL BILL SCHUETTE, PEOPLE OF MICHIGAN; GOVERNOR PHIL BRYANT, STATE OF MISSISSIPPI; GOVERNOR PAUL R. LEPAGE, STATE OF MAINE; GOVERNOR PATRICK L. MCCRORY, STATE OF NORTH CAROLINA; AND GOVERNOR C.L. "BUTCH" OTTER, STATE OF IDAHO, PLAINTIFFS

v.

UNITED STATES OF AMERICA; JEH JOHNSON, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, COMMISSSIONER OF U.S. CUSTOMS AND BORDER PROTECTION; RONALD D. VITIELLO, DEPUTY CHIEF OF U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER OF PROTECTION; THOMAS S. WINKOWSKI, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; AND LEÓN RODRÍGUEZ, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS

Dec. 9, 2014

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

---

1. The State of Texas, the State of Alabama, the State of Arizona, the State of Arkansas, the State of Florida, the State of Georgia, the State of Idaho, the State of Indiana, the State of Kansas, the State of Louisiana, the State of Montana, the State of Nebraska, the State of North Dakota, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of South Dakota, the State of Utah, the State of West Virginia, the State of Wisconsin, and Attorney General Bill Schuette of Michigan, Governor Phil Bryant of Mississippi, Governor Paul R. LePage of Maine, Governor Patrick L. McCrory of North Carolina, and Governor C.L. "Butch" Otter of Idaho (collectively, "Plaintiffs" or "Plaintiff States") seek declaratory and injunctive relief against the United States and the above-named federal officials (collectively, "the Defendants") for their violations of the Take Care Clause, U.S. CONST. art. II, § 3, cl. 5, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

2. This lawsuit is not about immigration. It is about the rule of law, presidential power, and the structural limits of the U.S. Constitution.

3. On November 20, 2014, the President of the United States announced that he would unilaterally suspend the immigration laws as applied to 4 million of the 11 million undocumented immigrants in the United States.

4. The President candidly admitted that, in so doing, he unilaterally rewrote the law: "What you're not

paying attention to is, *I just took an action to change the law.*"

5. In accordance with the President's unilateral exercise of lawmaking, his Secretary of the Department of Homeland Security ("DHS") issued a directive that purports to legalize the presence of approximately 40% of the known undocumented-immigrant population, and affords them legal rights and benefits. *See* Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents* (Nov. 20, 2014) ("DHS Directive") (attached as Ex. A).

6. That unilateral suspension of the Nation's immigration laws is unlawful. Only this Court's immediate intervention can protect the Plaintiffs from dramatic and irreparable injuries.

* * * * *

III. FACTUAL ALLEGATIONS

A. The DREAM Act

17. On March 26, 2009, Senator Richard Durbin and Representative Howard Berman introduced the DREAM Act in the U.S. Senate and House, respectively. *See* DREAM Act of 2009, S. 729 (111th Cong.) (2009); American Dream Act, H.R. 1751 (111th Cong.) (2009). Both bills would have allowed undocumented immigrants to apply for conditional permanent resident status if, among other things, (a) they entered the United States before their 16th birthdays, and (b) they

had been in the United States continuously for five years.

18. The President repeatedly and forcefully urged Congress to pass the DREAM Act.

19. And the President consistently insisted that he could not achieve the goals of the DREAM Act on his own. He said, for instance:

- "Comprehensive reform, that's how we're going to solve this problem. . . . Anybody who tells you . . . that I can wave a magic wand and make it happen hasn't been paying attention to how this town works." (May 5, 2010)

- "I am president, I am not king. I can't do these things just by myself. . . . [T]here's a limit to the discretion that I can show because I am obliged to execute the law. . . . I can't just make the laws up by myself." (Oct. 25, 2010)

- In response to a question about whether he could stop deportation of undocumented students with an executive order: "Well, first of all, temporary protective status historically has been used for special circumstances where you have immigrants to this country who are fleeing persecution in their countries, or there is some emergency situation in their native land that required them to come to the United States. So it would not be appropriate to use that just for a particular group that came here primarily . . . for economic opportunity. With respect to the notion that I can just *suspend deportations through executive order, that's just not the*

case, because there are laws on the books that Congress has passed. . . . There are enough laws on the books by Congress that are *very clear in terms of how we have to enforce our immigration system* that for me to simply through executive order *ignore those congressional mandates* would not conform with my appropriate role as President." (Mar. 28, 2011) (emphasis added)

- "I can't solve this problem by myself. . . . We're going to have to change the laws in Congress." (Apr. 20, 2011)

- "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one." (Apr. 29, 2011)

- "And sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that's not how a democracy works." (May 10, 2011)

- "[B]elieve me, the idea of doing things on my own is very tempting. . . . But that's not how . . . our system works. . . . That's not how our Constitution is written." (July 25, 2011)

- "Administratively, we can't ignore the law. . . . We are doing everything we can administratively. But the fact of the matter is there

are laws on the books that I have to enforce." (Sept. 28, 2011)

20. Neither congressional chamber passed the DREAM Act.

B. DACA

21. The President then asked the Department of Justice's Office of Legal Counsel ("OLC") whether he could effectuate the goals of the un-enacted DREAM Act by executive fiat. OLC said "yes," with certain conditions. In particular, OLC advised the President that he could use the concept of "deferred action for childhood arrivals," or "DACA," to stop deporting individuals who (a) entered the United States before their 16th birthdays, and (b) had been in the United States continuously for five years. *See* Memorandum Opinion for the Secretary of Homeland Security, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 18 n.8 (Nov. 19, 2014) ("OLC Memo") (attached as Ex. B) (noting that OLC orally advised the President "[b]efore DACA was announced" in 2012). OLC further advised, however, that "it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria." *Ibid.*

22. Notwithstanding his repeated insistence that he could not stretch his executive powers any further, the President announced his unilateral creation of the DACA program on June 15, 2012.

23. At the President's direction, the DHS Secretary then suspended the Nation's immigration laws for approximately 1.7 million undocumented immigrants. *See* Memorandum from Janet Napolitano, Secretary of the Department of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) ("DACA Memo") (attached as Ex. C).

24. The President and his DHS Secretary ordered federal immigration officials to extend "deferred action" to undocumented immigrants who (a) entered the United States before their 16th birthdays, and (b) had been in the United States continuously for five years.

25. Although OLC had cautioned the President that it was "critical" to DACA's legality that the Administration evaluate every application on a case-by-case basis, the President and DHS ignored that advice. According to the latest figures available, the Administration granted deferred action to 99.5-99.8% of DACA applicants.

C. ***Nava-Martinez***

26. The Executive Branch did not stop at dispensing with the Nation's immigration laws. Rather, as this Court already has found, the Administration adopted a policy that encouraged international child smuggling across the Texas-Mexico border. *See* Order,

United States v. Nava-Martinez, No. 1:13-cr-00441, at 2 (S.D. Tex. Dec. 13, 2013) ("*Nava-Martinez* Order").

27. The defendant in *Nava-Martinez*, an admitted human trafficker, was caught attempting to smuggle a ten-year-old El Salvadorean girl into the United States. *Id.* at 1.

28. The Court noted that this was "the fourth case with the same factual situation this Court has had in as many weeks." *Id.* at 3. Although the human traffickers were apprehended in each case, "the DHS completed the criminal conspiracy . . . by delivering the minors to the custody of the parent." *Ibid.*

29. This was done pursuant to DHS's "apparent policy . . . of completing the criminal mission of individuals who are violating the border security of the United States." *Id.* at 2. As this Court observed, "[t]his DHS policy is a dangerous course of action." *Ibid.* Under the policy, "instead of enforcing the laws of the United States, the Government [takes] direct steps to help the individuals who violated it." *Id.* at 3.

30. Moreover, this Court found that DHS's policy promotes human trafficking, which in turn "help[s] fund the illegal drug cartels which are a very real danger for both citizens of this country and Mexico." *Id.* at 6. The Court explained that citizens of the United States bear the economic brunt of this policy, because DHS "funds these evil ventures with their tax dollars." *Id.* at 8. In addition, the policy harms the citizens of each country that suffers from the "nefarious activities of the cartels." *Ibid.*

D. The Defendants Cause a Humanitarian Crisis

31. The Defendants' policies (including DACA and the policy described in *Nava-Martinez*) have had and continue to have dire consequences in the Plaintiff States. In the summer of 2014, an enormous wave of undocumented immigrants surged across the Texas-Mexico border, creating what President Obama described as a "humanitarian crisis." Nick Miroff & Joshua Partlow, *Central American Migrants Overwhelm Border Patrol Station in Texas*, WASH. POST (Jun. 12, 2014).

32. As many as 90,000 undocumented children are expected to be detained this year, and as many as 140,000 may be detained in 2015. Brett LoGiurato, *There's a Staggering Humanitarian Crisis on the U.S. Border, and It's Only Going to Get Worse*, BUS. INSIDER (Jun. 16, 2014). By comparison, only 6,000 to 7,500 children were detained between 2008 and 2011, under 14,000 were detained in 2012, and only 24,000 were detained in 2013. Alicia A. Caldwell, *Border Patrol Resources Stretched Thin As Children Illegally Enter U.S. Alone*, ASSOCIATED PRESS (Jun. 5, 2014).

33. Law enforcement officers reported "picking up children as young as 4 without their parents and other children with Hello Kitty backpacks, cellphones and the telephone numbers of U.S. relatives on note cards." Miroff & Partlow, *supra*.

34. But the humanitarian crisis is by no means limited to unaccompanied children. There is also "an unprecedented surge of families crossing illegally into the U.S." Cindy Carcamo, *Rumors of U.S. Haven for Families Spur Rise in Illegal Immigration*, L.A.

TIMES (June 6, 2014). While immigration officials do not have an official count of such families, they acknowledge that "the numbers appear to be substantial." *Ibid.*

35. This wave of immigration has been concentrated in the Rio Grande Valley of South Texas. Miroff & Partlow, *supra.* "Every day, hundreds of Central American migrants, in groups as large as 250 people, are wading across the muddy Rio Grande." *Ibid.*

36. The crisis has imposed enormous law enforcement costs on the Plaintiff States. For example, the Texas Department of Public Safety estimated that it was spending $1.3 million a week on troopers and resources to deal with the immigration surge; in addition, Governor Perry deployed 1,000 National Guard troops to the border at a cost of $38 million.

37. This crisis was caused by the immigration policies of the federal government, including the policy that this Court has already held to be unlawful. As Defendant Vitiello explained in his May 30th memorandum, "[i]f the U.S. government fails to deliver adequate consequences to deter aliens from attempting to illegally enter the U.S., the result will be an even greater increase in the rate of recidivism and first-time illicit entries." And the Obama Administration acknowledges that there is a "growing perception minors are crossing the border because they feel they will not be deported by the administration." LoGiurato, *supra.* Indeed, a research report commissioned by DHS revealed that "[w]ord had spread in Central America about a 'lack of consequences' for illegal entry" and that "[s]mugglers were exploiting the system." Susan

Carroll, *Report Warned of Child Migrant Crisis*, HOUSTON CHRON. (Jun. 17, 2014).

38. The President himself predicted this outcome. On July 1, 2010, he explained that it would be "both unwise and unfair" to "ignore the laws on the books and put an end to deportation" because it "would suggest to those thinking about coming here illegally that there will be no repercussion for such a decision." That in turn "could lead to a surge in more illegal immigration." As the President concluded, "no matter how decent they are, no matter their reasons, the 11 million who broke these laws should be held accountable."

39. The Defendants, however, have contributed to the surge of illegal immigration by refusing to enforce the laws on the books. On average, only 1,600 unaccompanied children are removed each year; in 2013, there were over 20,000 detentions of unaccompanied children from Guatemala, Honduras, and El Salvador, but only 496 unaccompanied children from those countries were repatriated. Carroll, *supra*. And the total number of undocumented children deported by the Obama Administration in 2013 was only 1,669—an 80 percent reduction from 2008. Brian Bennett, *Deportation Data Won't Dispel Rumors Drawing Migrant Minors to U.S.*, L.A. TIMES (July 5, 2014).

40. Similarly, adults with children who are detained at the border are routinely released and allowed to travel within the United States. Carcamo, *supra*. And while they may be instructed to show up for a follow-up appointment, "ICE officials said they couldn't guarantee that they would pursue all cases in which immigrants do not show up for follow-up appoint-

ments." *Ibid.* Tellingly, the immigrants arrested for illegally entering the U.S. refer to ICE's Notice to Appear documents as "*permisos*," or permits. Byron York, *On Immigrant Surge, White House Story Falls Apart*, WASH. EXAMINER (Jun. 16, 2014).

41. Unsurprisingly, the undocumented immigrants crossing the border are motivated primarily by the belief that they will not be deported. The federal government's own analysis demonstrates as much. When Border Patrol agents recently questioned 230 undocumented immigrants about why they came, "the results showed overwhelmingly that the immigrants, including those classified as . . . unaccompanied children, were motivated by the belief that they would be allowed to stay in the United States." *Ibid.*

42. Multiple reports indicate that undocumented immigrants are counting on federal officials for help in reuniting with their friends or family in the U.S. Hundreds of Central American migrants "turn[] themselves in to the Border Patrol" on a daily basis. Miroff & Partlow, *supra*. One undocumented immigrant stated that she and her group "had looked forward to being caught . . . at one point even waving down federal helicopters . . . because of the welcoming treatment they had assumed they would receive." Carcamo, *supra*. Another planned to surrender to Border Patrol because she had heard "that the Americans are helping Hondurans right now," especially women and children. Miroff & Partlow, *supra*. All of the 230 undocumented immigrants interviewed by Border Patrol agents for their recent report "stated that they

had family members or, to a lesser extent, friends already living in the U.S." York, *supra*.

43. And the Defendants have conceded that their failure to enforce the federal immigration laws has increased the flow of illegal immigration across the Texas-Mexico border. *See* Vitiello Memorandum. The effects of that failure have caused acute crises in the Plaintiff States.

E. The President "Change[s] the Law"

44. Between his 2012 DACA announcement and the midterm elections in November 2014, the President repeatedly acknowledged that his non-enforcement efforts already had reached the outer limit of his administrative powers, and that any further transformation of the immigration system would have to be accomplished by legislation. He said, for instance:

- "[A]s the head of the executive branch, there's a limit to what I can do. . . . [U]ntil we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we're going to continue to be bound by the law." (Sept. 20, 2012)

- "We are a nation of immigrants. . . . But we're also a nation of laws. So what I've said is, we need to fix a broken immigration system. And I've done everything that I can on my own." (Oct. 16, 2012)

- In response to a question about the possibility of a moratorium on deportations for non-criminals: "I'm not a king. I am the head of

the executive branch of government. I'm required to follow the law." (Jan. 30, 2013)

- In response to the question whether he could do for "an undocumented mother of three" what he did for DACA recipients: "I'm not a king . . . [W]e can't simply ignore the law. When it comes to the dreamers we were able to identify that group. . . . But to sort through all the possible cases of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform. . . . [I]f this was an issue that I could do unilaterally I would have done it a long time ago. . . . The way our system works is Congress has to pass legislation. I then get an opportunity to sign and implement it." (Jan. 30, 2013)

- "This is something I've struggled with throughout my presidency. The problem is that you know I'm the president of the United States, I'm not the emperor of the United States. . . . And what that means is that we have certain obligations to enforce the laws that are in place. . . . [W]e've kind of stretched our administrative flexibility as much as we can." (Feb. 14, 2013)

- "I think that it's very important for us to recognize that the way to solve this problem has to be legislative. . . . And we've been able to provide help through deferred action for young people and students. . . . But this is a prob-

lem that needs to be fixed legislatively." (July 16, 2013)

- "[M]y job in the executive branch is supposed to be to carry out the laws that are passed. Congress has said 'here is the law' when it comes to those who are undocumented, and they've allocated a whole bunch of money for enforcement. . . . What we can do is then carve out the DREAM Act, saying young people who have basically grown up here are Americans that we should welcome. . . . *But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So, that's not an option.*" (Sept. 17, 2013) (emphasis added)

- "[I]f in fact I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal." (Nov. 25, 2013)

- "[W]hat I've said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do. What I've done is to use my prosecutorial discretion. . . . What we've said is focus on folks who are engaged in criminal activity, focus on people who engaged in gang activity. Do not focus on young people, who we're calling

> DREAMers. . . . That already stretched my administrative capacity very far. But I was confident that that was the right thing to do. But at a certain point the reason that these deportations are taking place is, Congress said, 'you have to enforce these laws.' They fund the hiring of officials at the department that's charged with enforcing. *And I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books.*" (Mar. 6, 2014) (emphasis added)

45. Accordingly, the President repeatedly called on Congress to pass an immigration reform bill. On June 27, 2013, the Senate passed a bill that, among other things, would have created a pathway to citizenship for undocumented immigrants. *See* Border Security, Economic Opportunity, & Immigration Modernization Act, S. 744 (113th Cong.) (2013). The House, on the other hand, did not pass similar legislation.

46. Before the midterm elections in November 2014, Democrats in the Senate urged the President not to act unilaterally because it "could be so politically damaging in their states that it would destroy their chances to hold control of the Senate." Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan*, N.Y. TIMES (Nov. 28, 2014). The President honored that request.

47. On November 20, 2014, the President announced that he would unilaterally create legal protections for approximately 4 million undocumented immigrants. Under the President's plan, the undocumented parents of U.S. citizens and legal permanent resi-

dents would receive deferred action status, as well as work permits and tolling of their unlawful presence in the United States. The President also expanded DACA to hundreds of thousands of additional undocumented immigrants.

48. The President candidly admitted that his plan was unilateral legislation: "What you're not paying attention to is, *I just took an action to change the law.*"

49. The President further admitted that he was changing the law because Congress chose not to: "[W]hen members of Congress question my authority to make our immigration system work better, I have a simple answer: Pass a bill. . . . And the day I sign that bill into law, the actions I take will no longer be necessary."

50. The President also made clear that he was "offer[ing] the following deal": "[I]f you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community—you're not going to be deported. . . . If you meet the criteria, you can come out of the shadows, you can get right with the law."

F. The DHS Directive

51. The President's new policies were effectuated through Defendant Johnson's DHS Directive. The DHS Directive closely resembled, and purported to "supplement[ ] and amend[ ]," the DACA Memo. *See* Exs. A & C.

52. In particular, Johnson instructed USCIS "to expand DACA as follows:" by "[r]emov[ing] the age

cap" that had previously applied, by "[e]xtend[ing] DACA renewal and work authorization to three-years [sic]" from the previous two, and by "[a]djust[ing] the date-of-entry requirement" from June 15, 2007, to January 1, 2010. DHS Directive at 3-4.

53. Johnson also "direct[ed] USCIS to establish a process, similar to DACA" for extending deferred action to the parents of citizens or lawful permanent residents. *Id.* at 4. In addition, the beneficiaries of deferred action are eligible to apply for federal work authorization.

54. The DHS Directive sets out a series of explicit criteria for who will be eligible for this expansion of deferred action. It requires applicants to "file the requisite applications for deferred action" and "submit biometrics for USCIS to conduct background checks." *Ibid.* USCIS is instructed to "begin accepting applications from eligible applicants no later than one hundred and eighty (180) days" from the date of the Directive. *Id.* at 5. Moreover, USCIS, ICE, and CBP are directed to consider the new deferred action criteria "for all individuals [they] encounter[ ]," including individuals in their custody, and individuals whose removal is pending. *Ibid.*

55. The Defendants have made clear that the DHS Directive will operate like the DACA program that came before it—namely, as an entitlement to relief for virtually every applicant who meets DHS's eligibility criteria. That is evident from the President's statement that the DHS Directive provides a "deal" to ensure that eligible applicants "will not be deported"; from the DHS Directive itself, which creates an appli-

cation process and eligibility criteria in mandatory terms (like "shall" and "must"); and from the 99.5-99.8% acceptance rate for DACA applicants.

56. The purported legal justification for the DHS Directive is contained in the OLC Memo. *See* Ex. B. In relevant part, the memo analyzed two DHS proposals. The first proposal, which the Administration adopted, was the extension of deferred action status to parents of U.S. citizens and lawful permanent residents. The second proposal, which the Administration has not yet adopted, was the extension of deferred action status to parents of DACA recipients. OLC concluded that the first proposal would be a lawful exercise of enforcement discretion, but the second would not.

57. The OLC Memo acknowledged that there are three important differences between the proposed programs and exercises of enforcement discretion. *Id.* at 20-21. First, deferred action is not merely a "decision not to prosecute an individual for past unlawful conduct"; instead, it is "a decision to openly tolerate an undocumented alien's continued presence in the United States." *Id.* at 20. Second, deferred action carries legal benefits beyond non-enforcement, such as the right to seek employment authorization. *Ibid.* Third, class-based deferred action programs, like the ones at issue here, "do not merely enable individual immigration officials to select deserving beneficiaries," but instead "set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status." *Ibid.* In spite of all this, OLC concluded that the programs

could potentially constitute exercises of enforcement discretion.

58. OLC then considered whether the proposals would be lawful under *Heckler v. Chaney*, 470 U.S. 821 (1985), a seminal enforcement-discretion case. OLC acknowledged that *Chaney* imposes four limitations on enforcement discretion. First, enforcement decisions must rely on factors that are within the agency's expertise; second, the executive cannot effectively rewrite the laws under the guise of enforcement discretion; third, the executive cannot adopt a general policy that amounts to an abdication of its statutory responsibilities; and finally, enforcement discretion generally requires case-by-case decisionmaking. OLC Memo at 6-7.

59. OLC concluded that the first DHS proposal, which concerned the parents of citizens and legal permanent residents, met this test. *Id.* at 26-31. OLC based that conclusion, in part, on much smaller and more targeted deferred action programs that previous Congresses approved. In particular, OLC found probative that Congress previously approved deferred action for victims of violence and trafficking, family members of U.S. citizens killed in combat, and family members of individuals killed in the September 11 attacks. *Id.* at 29-30. In OLC's view, those previous congressional approvals legalized DHS's unilateral effort to create the single largest deferred action program in our Nation's history, permitting 4 million undocumented immigrants to remain in the country.

60. OLC reached the opposite conclusion with respect to the second DHS proposal, which concerned

deferred action for parents of DACA recipients. Although OLC acknowledged that the two proposals had significant similarities, it nevertheless rejected the second proposal as unlawful because it was not "consistent with the congressional policies and priorities embodied in the immigration laws." *Id.* at 33.

G. The DHS Directive Harms Plaintiffs

61. The DHS Directive will substantially increase the number of undocumented immigrants in the Plaintiff States. At the most basic level, the Directive is a promise to openly tolerate entire classes of undocumented immigrants. In addition, the Directive offers affirmative legal inducements to stay, such as work authorization and the tolling of unlawful presence. White House officials also have stated that the beneficiaries of deferred action are eligible for Social Security and Medicare. The removal of the deportation threat, combined with the incentives to stay, will make remaining in the United States far more attractive for the affected classes of undocumented immigrants.

62. Moreover, the DHS Directive is certain to trigger a new wave of undocumented immigration. As explained above, DACA led directly to a flood of immigration across the Texas-Mexico border and a "humanitarian crisis" in Texas. The federal government itself recognized that its lax attitude toward the immigration laws caused this wave. *See* Vitiello Memorandum. The DHS Directive is a much larger step than DACA, and it will trigger a larger response.

63. The DHS Directive will increase human trafficking in the Plaintiff States. Such trafficking is largely controlled by the Mexican drug cartels, which

are the most significant organized crime threat to the State of Texas. *See* Texas Department of Public Safety, *Texas Public Safety Threat Overview* at 2, 23 (Feb. 2013). By boosting undocumented immigration, the DHS Directive will bolster the business of the cartels and greatly exacerbate the risks and dangers imposed on Plaintiffs by organized crime. *See Nava-Martinez* Order at 6 (explaining that human trafficking "help[s] fund the illegal drug cartels which are a very real danger for both citizens of this country and Mexico").

64. The Plaintiff States will be forced to expend substantial resources on law enforcement, healthcare, and education. Some of these expenditures are required or coerced by federal law. For instance, the Supreme Court has held that States are constitutionally obligated to provide free education to children of undocumented immigrants. *Plyler v. Doe*, 457 U.S. 202 (1982). Similarly, both Medicare and Medicaid require provision of emergency services, regardless of documented immigration status, as a condition of participation. *See* 42 U.S.C. § 1395dd; 42 C.F.R. § 440.225.

65. Other expenditures are required by state law. For example, Texas law requires local governments to provide healthcare for the indigent. *See* Indigent Health Care and Treatment Act, TEX. HEALTH & SAFETY CODE §§ 61.001 *et seq.* In FY2014, Texas counties reported over $23 million in indigent health care expenditures. Texas law also requires nonprofit hospitals to provide unreimbursed care for the indigent as a condition of maintaining their nonprofit status. *See* TEX. HEALTH & SAFETY CODE § 311.043.

66. Other costs follow specifically from the extension of deferred action status. For instance, federal work authorization functions as a precondition for certain professional licenses in the Plaintiff States. *See, e.g.*, 16 TEX. ADMIN. CODE § 33.10 (requiring applicants for an alcoholic beverage license to be "legally authorized to work in the United States"); 37 TEX. ADMIN. CODE § 35.21 (requiring employees of private security companies to submit application, including a copy of a current work authorization card); TEX. RULES GOVERN. BAR ADM'N, R. II(a)(5)(d) (making individuals who are "authorized to work lawfully in the United States" eligible to apply for admission as licensed attorneys).

67. Texas and other Plaintiff States also rely on Defendants' evidence of lawful presence for certain benefits under their respective state laws. *See, e.g.*, TEX. LAB. CODE § 207.043(a)(2) (extending unemployment benefits to individuals who were "lawfully present for purposes of performing the services"); TEX. FAM. CODE § 2.005(b)(4) (allowing an "Employment Authorization Card" to be used as proof of identity for the purposes of a marriage license application).

68. By authorizing a large class of undocumented immigrants to work in the United States, the DHS Directive will expose Texas to the cost of processing and issuing additional licenses and benefits. Moreover, it will cause Texas to issue such licenses and benefits to individuals who are not legally authorized to be in the country (or to take on the burdensome task of attempting to figure out which undocumented immigrants have bona fide deferred action status and which ones benefited from the unlawful DHS Directive).

69. If the Plaintiff States had the sovereign power to redress these problems, they would. *See Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). But the Supreme Court has held that authority over immigration is largely lodged in the federal government. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492 (2012). Accordingly, litigation against the federal government is the only way for the States to vindicate their interests and those of their citizens.

IV. CLAIMS FOR RELIEF

COUNT ONE

Violation Of The Take Care Clause, Art. II, § 3, Cl. 5

70. The allegations in paragraphs 1-69 are reincorporated herein.

71. The DHS Directive violates the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 5.

72. The Supreme Court has made clear that the Take Care Clause is judicially enforceable against presidential invocations of the dispensing power. *See, e.g., Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612-13 (1838); *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 U.S. 293, 296 (1945).

73. The Take Care Clause limits the President's power and ensures that he will faithfully execute Congress's laws—not rewrite them under the guise of executive "discretion."

74. In this case, the President admitted that he "took an action to change the law." The Defendants could hardly contend otherwise because a deferred action program with an acceptance rate that rounds to 100% is a de facto entitlement—one that even the President and OLC previously admitted would require a change to the law.

75. The Defendants have rewritten several laws passed by Congress. Congress has provided that it is illegal for undocumented immigrants to be in the United States and has required the executive branch to remove those individuals. Under 8 U.S.C. § 1225, every individual who is not present in the United States legally "shall" be "inspected" by immigration officers; and if the officer determines that the individual is not clearly and beyond a doubt entitled to be admitted, the individual "shall be detained" for removal proceedings. *Id.* § 1225(a)(1), (a)(3), (b)(2)(A). This imposes a mandatory duty on the executive branch. *See Crane v. Napolitano*, 2013 WL 1744422, at * 8, No. 3:12-cv-03247-O (N.D. Tex. Apr. 23, 2013) (holding that 8 U.S.C. § 1225 imposes a mandatory duty and explaining that "[t]he Supreme Court has noted that Congress's use of the word 'shall' in a statute imposes a mandatory duty on an agency to act." (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)). This mandatory duty extends to the removal of any undocumented immigrant present in violation of federal law, unless Congress provides a specific exception. *See* 8 U.S.C. §§ 1182, 1227(a)(1), 1229b, 1254 (setting standards for inadmissibility and categories for deportability, along with limited statutory exceptions.

such as cancellation of removal and temporary protected status).

76. At least for the 4 million people who will benefit from the DHS Directive, Congress has taken several steps to curtail the reunification of undocumented immigrants and their documented family members. The undocumented parent of a U.S. citizen or legal permanent resident generally can stay in the United States only by (i) waiting until their child turns 21, (ii) leaving the country, (iii) waiting 10 more years, and then (iv) obtaining a family-preference visa from a U.S. consulate abroad. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255. The Defendants cannot faithfully execute the law by directly contravening Congress's objectives.

77. Accordingly, the Defendants' actions violate the Take Care Clause.

COUNT TWO

Violation of the APA, 5 U.S.C. § 553

78. The allegations in paragraphs 1-77 are reincorporated herein.

79. The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

80. DHS is an "agency" under the APA. 5 U.S.C. § 551(1).

81. The DHS Directive is a "rule" under the APA. 5 U.S.C. § 551(4).

82. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. 5 U.S.C. § 553.

83. The Defendants promulgated and relied upon the DHS Directive without authority and without notice-and-comment rulemaking. It is therefore unlawful.

COUNT THREE

Violation of the APA, 5 U.S.C. § 706

84. The allegations in paragraphs 1-83 are reincorporated herein.

85. The APA requires this Court to hold unlawful and set aside any agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

86. The DHS Directive purports to create legal rights for millions of undocumented immigrants. And it does so by rewriting the immigration laws and contradicting the priorities adopted by Congress. *See, e.g.*, ¶¶ 75-76, *supra*.

87. As such, the DHS Directive violates the aforementioned provisions in 5 U.S.C. § 706, and it is therefore unlawful.

V. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

A. A declaratory judgment and injunction that the Defendants' deferred action program violates the Take Care Clause;

B. A declaratory judgment and injunction that the Defendants' deferred action program is procedurally unlawful under the APA;

C. A declaratory judgment and injunction that the Defendants' deferred action program is substantively unlawful under the APA; and

D. All other relief to which the Plaintiffs may show themselves to be entitled.

Respectfully submitted.

* * * * *

Dated: Dec. 9, 2014

Office of Legal Counsel,
The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS's enforcement discretion.

Nov. 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens

over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropri-

ate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483-84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy

guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive

scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal.

See 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each tech-

nical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; cf. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much

like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832-33.

The principles of enforcement discretion discussed in Chaney apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.*

§ 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, "[a]t each stage" of the removal process—"commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see Chaney*, 470 U.S. at 831-33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests,

by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id.* Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id.* at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the

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[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503-05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g., Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676-77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot nonenforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.*, 37 F.3d at 676-77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses "special risks" that the agency has exceeded the bounds of its enforcement

discretion. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See*

generally id. at 3-5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id.* at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id.* at 3-4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id.* at 3-5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien fall-

ing in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority"

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[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id.* at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id.* at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney*, 470 U.S. at 831. Faced with sharply limited

resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3-4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of

other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676-77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal priorities is also consistent with the categorical nature

of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id.* Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[1]

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[1] In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S.

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removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483-84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

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[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id.* § 1255(a), and may eventually qualify them for Federal means-tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a)

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-

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(2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf.* 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). See generally Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum*, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5-10 (July 13, 2012) ("CRS Immigration Report").

priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am. Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); see id. at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States —and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, how-

ever, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42 (May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is

present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically

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[6] Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

present aliens who were beneficiaries of approved visa petitions—known as "Third Preference" visa petitions —relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20-23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12-14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief

available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm.*

on Immigration and Claims of the H. Comm. on the Judiciary, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with*

Bona Fide Applications for T Nonimmigrant Status at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted prima facie evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. See 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800-01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Ad-*

versely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ) at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1-2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_ PR.pdf (last visited Nov. 19, 2014). USCIS explained that such requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald

Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

5. *Deferred Action for Childhood Arrivals.* Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re:*

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[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit"). Successful DACA applicants receive deferred action for a period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

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[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred

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deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class- wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer selfpetition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any

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[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No.

108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at 49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises

of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature —the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement

discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See*

8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048-50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA requires

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[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080-81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the

the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.*

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only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

§ 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although

every class-wide deferred action program that has been implemented to date has established certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15-18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676-77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the

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[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (November 19, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised-

case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474

IRS-Voluntary-Disclosure-Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

U.S. 121, 139 (1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137-39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6-7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra*

pp. 6-7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676-77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritiz-

es the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and

resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have

remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197-99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a)

(providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13] Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust

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[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155-56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009-10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to

the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21-22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well

settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens —a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine

whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the interven-

ing period.[14] Immigration officials have on several occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval— and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp.

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[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197-99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

18-20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is

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[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14-15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later im-

plicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten— potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved

in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally

entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. See DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocu-

mented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of

families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

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[SEAL OMITTED] **Homeland Security**

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
/s/ JANET NAPOLITANO
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these

individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to coun-

tries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are <u>in</u> removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the

above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.

- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.

- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

/s/ JANET NAPOLITANO
JANET NAPOLITANO

Office of Immigration Statistics
Annual Report (September 2014)
Immigration Enforcement Actions: 2013

JOHN F. SIMANSKI

Each year, the Department of Homeland Security (DHS) undertakes immigration enforcement actions involving hundreds of thousands of aliens who may be or are in violation of U.S. immigration laws. These actions include the apprehension or arrest, detention, return, and removal from the United States of aliens (see Box 1). Aliens may be removable from the United States for violations including illegally entering the United States, failing to abide by the terms and conditions of admission, or committing crimes. Primary responsibility for the enforcement of immigration law within DHS rests with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS). CBP is generally responsible for immigration enforcement at and between the ports of entry, and ICE is generally responsible for interior enforcement, and detention and removal operations. USCIS is generally responsible for the administration of immigration and naturalization functions (see **APPENDIX**).

This Office of Immigration Statistics (OIS) Annual Report presents information on aliens determined inadmissible, apprehended, arrested, detained, returned, or

removed, during 2013.[1] Key findings in this report include:

- CBP determined approximately 204,000 aliens were inadmissible.
- DHS apprehended approximately 662,000 aliens; 64 percent were citizens of Mexico.
- ICE detained nearly 441,000 aliens.
- Approximately 178,000 aliens were returned to their home countries through processes that did not require a removal order.
- DHS removed approximately 438,000 aliens from the United States.[2] The leading countries of origin for those removed were Mexico (72 percent), Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.8 percent).
- Expedited removal orders accounted for 44 percent, of all removals.
- Reinstatements of final orders accounted for 39 percent, of all removals.
- ICE removed approximately 198,000 known criminal aliens from the United States.[3]

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[1] In this report, years refer to fiscal years (October 1 to September 30).

[2] Includes removals, counted in the year the events occurred, by both ICE and CBP. Removals and returns are reported separately.

[3] Refers to persons removed who have a prior criminal conviction.

ENFORCEMENT ACTIONS PROCESS

Inspection Process

All aliens who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States are inspected. CBP officers within the Office of Field Operations (OFO) determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry. Applicants for admission determined to be inadmissible may be, as appropriate, permitted to voluntarily withdraw their application for admission and return to their home country, processed for expedited removal or referred to an immigration judge for removal proceedings. CBP officers may transfer aliens issued a charging document (e.g., Notice to Appear (NTA), Notice of Referral to an Immigration Judge) to ICE for detention and custody determinations. Aliens who apply under the Visa Waiver Program (VWP) who are found to be inadmissible are refused admission without referral to an immigration judge, per Section 217 of the Immigration and Nationality Act (INA), unless the alien requests asylum.

Apprehension Process

Aliens who enter without inspection between ports of entry and are apprehended by U.S. Border Patrol (USBP) of CBP may be, as appropriate, removed, permitted to return to their country, or issued a NTA to commence proceedings before the immigration court. Aliens issued a charging document are either transferred to ICE for detention and custody determinations pending a hearing or released on their own recognizance. Beginning in FY12, USBP implemented the

Consequence Delivery System (CDS) across all sectors. CDS guides USBP agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity. CDS consequences can include administrative, criminal, or programmatic actions.

Aliens unlawfully present in the United States and those lawfully present who are subject to removal may be identified and apprehended by ICE within the interior of the United States. The agency's two primary operating components are Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO). ICE may identify aliens in violation of their status for removal while they are incarcerated, during worksite enforcement operations, or through other means. Aliens apprehended by ICE are generally subject to the same consequences as aliens who are apprehended by USBP.

Benefit Denial

USCIS has authority to issue an NTA or otherwise refer an alien for removal proceedings upon determining that an alien is inadmissible or has violated immigration law pursuant to INA Sections 212 and 237. USCIS will also issue an NTA when required by statute or regulation,[4] e.g., termination of conditional permanent resident status, denial of asylum application, ter-

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[4] As authorized by Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM 602-0050, November 7, 2011. http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf

mination of refugee status, or positive credible fear determination.

Detention Process

Following arrest or transfer of custody from CBP, ICE ERO makes custody redeterminations, which may result in detention or release on bond, orders of supervision, or orders of recognizance. An alien may be detained during the pendency of removal proceedings, and, if an alien is ordered removed, the alien may be detained for a certain period of time pending repatriation.

BOX 1.

Definitions of Immigration Enforcement Terms

Administrative Removal: The removal of an alien not admitted for permanent residence, or of an alien admitted for permanent residence on a conditional basis pursuant to section 216 of the INA, under a DHS order based on the determination that the individual has been convicted of an aggravated felony (INA § 238(b)(1)). The alien may be removed without a hearing before an immigration judge.

Alien: A person who is not a citizen or national of the United States.

Deportable Alien: An alien inspected and admitted into the United States but who is subject to removal under INA § 237(a).

Detention: The physical custody of an alien in order to hold him/her, pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship after a final order of removal has been entered.

Expedited Removal: The removal without a hearing before an immigration judge of an alien arriving in the United States who is inadmissible because the individual does not possess valid entry documents or is inadmissible for fraud or misrepresentation of material fact; or the removal of an alien who has not been admitted or paroled in the United States and who has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period (INA § 235(b)(1)(A)).

Inadmissible Alien: An alien who is ineligible to receive a visa and ineligible to be admitted to the United States, according to the provisions of INA § 212(a).

Reinstatement of Final Removal Orders: The removal of an alien on the reinstatement of a prior removal order, where the alien departed the United States under an order of removal and illegally re-entered the United States (INA § 241(a)(5)). The alien may be removed without a hearing before an immigration judge.

Removable Alien: An alien who is inadmissible or deportable (INA § 240(e)(2)).

Removal: The compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry.

Return: The confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

Removal Process

Removal proceedings include the administrative process that leads to the removal of an alien pursuant to Sections 237 or 212 of the INA.

Unless eligible for relief, the most common dispositions for aliens found within the United States, are returns, expedited removals, reinstatements of final orders and removal obtained through removal proceedings.

Return. Certain apprehended aliens who appear to be inadmissible or deportable may be offered the opportunity to *voluntarily* return to their home country in lieu of formal removal proceedings before an immigration judge.[5] Generally, aliens waive their right to a hearing, remain in custody, and, if applicable, agree to depart the United States under supervision. Some aliens apprehended within the United States may agree to *voluntarily depart* and pay the expense of departing. Voluntary departure may be granted by an immigration judge, during an immigration hearing or prior to an immigration hearing by certain DHS officials.

Expedited Removal. DHS officers and agents may order the expedited removal of certain aliens who are inadmissible because they do not possess valid entry documents or are inadmissible for fraud or misrepresentation of material fact; or because the alien, who has not been admitted or paroled in the United State, has

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[5] Examples include voluntary departure under INA § 240B, VWP returns under INA § 217(b), crewmembers under INA § 252(b) and stowaways under INA § 217(b).

not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period. Aliens placed in expedited removal proceedings are generally not entitled to immigration proceedings before an immigration judge unless the alien is seeking asylum or makes a claim to legal status in the United States. An expedited removal order issued by a DHS officer is equivalent to a removal order issued by an immigration judge.

Reinstatement of Final Removal Orders. Section 241(a)(5) of the INA permits DHS to reinstate final removal orders, without further hearing or review, for aliens who were removed or departed voluntarily under an order of removal and who illegally re-entered the United States.

Removal Proceedings. Aliens not immediately returned or processed for removal by a DHS officer, e.g. due to a fear of return or because the alien has applied for certain forms of adjustment of status, may be issued an NTA for an immigration hearing and may be transferred to ICE for a custody determination, which may result in detention or release on bond, orders of supervision, or orders of recognizance. Removal hearings before an immigration court may result in a variety of outcomes including an order of removal; a grant of voluntary departure at the alien's expense (considered a "return"); a grant of certain forms of relief or protec-

tion from removal, which could include adjustment to lawful permanent resident status; or termination of proceedings. Decisions of immigration judges can be appealed to the Board of Immigration Appeals.

The penalties associated with removal include not only the removal itself but also possible fines, imprisonment for up to ten years for those who fail to appear at hearings or who fail to depart, and a bar to future legal entry.[6] The imposition and extent of these penalties depend upon the individual circumstances of the case.

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[6] The bar is permanent for aggravated felons and up to 20 years for certain other aliens.

Table 1.

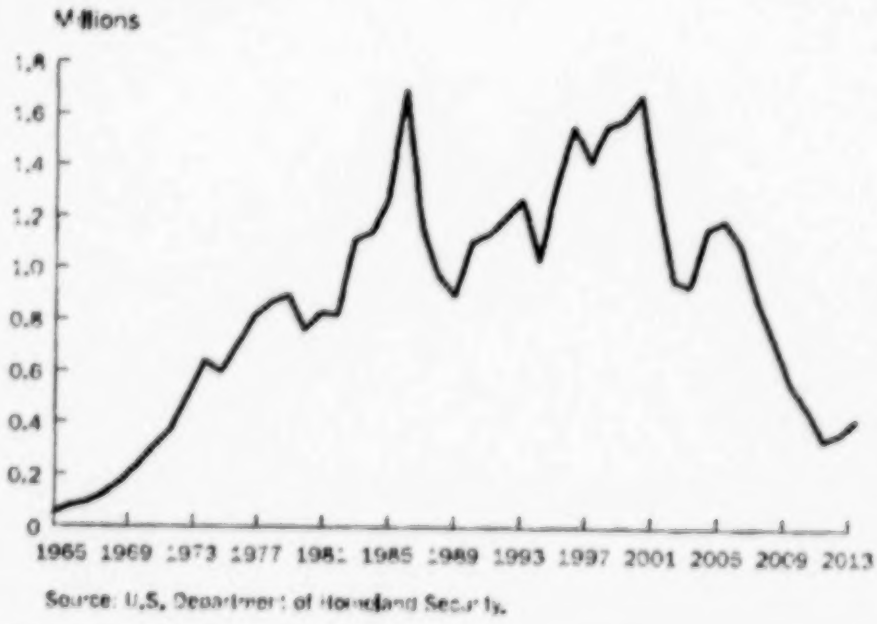
Apprehensions by Program and Country of Nationality: Fiscal Years 2011 to 2013

(Countries ranked by 2013 apprehensions.)

Program and country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
PROGRAM						
Total	662,493	100.0	671,327	100.0	678,606	100.0
CBP U.S. Border Patrol	420,789	63.5	364,768	54.3	340,252	50.1
(SW border sectors subtotal)	414,397	62.6	356,873	53.2	327,577	48.3
ICE Enforcement and Removal Operations	229,638	34.7	290,822	43.3	322,093	47.5
ICE Homeland Security Investigations	11,966	1.8	15,937	2.4	16,261	2.4
COUNTRY OF NATIONALITY						
Total	662,493	100.0	671,327	100.0	678,606	100.0
Mexico	424,978	64.1	468,766	69.8	517,472	76.3
Guatemala	74,208	11.2	57,386	8.6	41,709	6.1
Honduras	64,157	9.7	50,771	7.6	31,189	4.6
El Salvador	51,226	7.7	38,979	5.8	27,652	4.1
Ecuador	5,680	0.9	4,374	0.7	3,298	0.5
Dominican Republic	3,893	0.6	4,106	0.7	4,433	0.7
Cuba	2,909	0.4	4,121	0.6	4,801	0.7
Nicaragua	2,712	0.4	2,532	0.4	2,278	0.3
Jamaica	2,147	0.3	2,655	0.4	2,962	0.4
Haiti	1,992	0.3	1,492	0.2	1,391	0.2
All other countries, including unknown	29,681	4.5	35,645	5.3	41,562	6.1

Source: U.S. Department of Homeland Security, Enforcement Integrated Database (EID): Seized Asset and Case Tracking System (SEACATS), EID Arrest Graphical User Interface for Law Enforcement (EAGLE). CBP U.S. Border Patrol data for 2013 are current as of November 2013, 2012 are current as of November 2012, 2011 are current as of December 2011. ICE Enforcement and Removal Operations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of January 2012. Homeland Security Investigations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of June 2012.

Figure 1.
Apprehensions by the U.S. Border Patrol: Fiscal Years 1965 to 2013



DATA[7]

Apprehension and inadmissibility data are collected in the Enforcement Integrated Database (EID) using Form I-213, Seized Asset and Case Tracking System (SEACATS), and EID Arrest Graphical User Interface for Law Enforcement (EAGLE). Data on individuals detained are collected through the ICE ENFORCE Alien Detention Module (EADM) and the ENFORCE

[7] CBP data (apprehensions, inadmissible aliens, removals, and returns) are current as of November 2013. ICE ERO apprehension data are current as of October 2013. ICE HSI data are current as of October 2013. ICE removal and return data are current as of January 2014. USCIS NTA data current as of May 2014.

Alien Removal Module (EARM). Data on USCIS NTAs are collected using the USCIS NTA Database. Data on individuals removed or returned are collected through both EARM and EID.

The data on enforcement actions (e.g., inadmissible aliens, apprehensions, NTAs, and removals) relate to events. For example, an alien may be apprehended more than once, and each apprehension would count as a separate record. Removals and returns are reported separately and counted in the years the events occurred. Data appearing for a given year may change in subsequent years due to updating of the data series.[8]

TRENDS AND CHARACTERISTICS OF ENFORCEMENT ACTIONS

Apprehensions

DHS made 662,483 apprehensions in 2013 (see Table 1). The U.S. Border Patrol was responsible for 420,789 or 64 percent (see Figure 1) of all apprehensions. Ninety-eight percent of USBP apprehensions occurred along the Southwest border. ICE ERO made 229,698 administrative arrests and ICE HSI made 11,996 administrative arrests.[9]

Nationality of All Apprehended Aliens. In 2013, Mexican nationals accounted for 64 percent of all aliens apprehended by Immigration and Customs Enforce-

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[8] Arrests under INA § 287(g) are included in ICE ERO apprehension data for 2011 to 2013.

[9] An administrative arrest refers to the arrest of an alien who is charged with an immigration violation. Administrative arrests are included in the DHS apprehension totals.

ment or the U.S. Border Patrol, down from 70 percent in 2012. The next leading countries were Guatemala (11 percent), Honduras (9.7 percent), and El Salvador (7.7 percent). These four countries accounted for 93 percent of all apprehensions.

Nationality of Aliens Apprehended by Border Patrol. Non-Mexican aliens accounted for 36 percent of all USBP apprehensions in 2013, up from 27 percent in 2012. USBP apprehensions of non-Mexican aliens increased 182 percent from 2011 to 2013.

Table 2.

Apprehensions by U.S. Border Patrol Sector: Fiscal Years 2011 to 2013

(Sectors ranked by 2013 apprehensions)

U.S. Border Patrol Sector	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	420,789	100.0	364,768	100.0	340,252	100.0
Rio Grande Valley, TX	154,453	36.7	97,762	26.8	59,243	17.4
Tucson, AZ	120,939	28.7	120,000	32.9	123,285	36.2
Laredo, TX	50,749	12.1	44,872	12.3	36,053	10.6
San Diego, CA	27,496	6.5	28,461	7.8	42,447	12.5
Del Rio, TX	23,510	5.6	21,720	6.0	16,144	4.7
El Centro, CA	16,306	3.9	23,916	6.6	30,191	8.9
El Paso, TX	11,154	2.7	9,678	2.7	10,349	3.0
Yuma, AZ	6,106	1.5	6,500	1.8	5,833	1.7
Big Bend, TX*	3,684	0.9	3,964	1.1	4,036	1.2
Miami, FL	1,738	0.4	2,509	0.7	4,401	1.3
All other sectors	4,654	1.1	5,386	1.5	8,274	2.4

* Formerly known as Marfa, TX

Source: U.S. Department of Homeland Security, Customs and Border Protection (CBP), U.S. Border Patrol, USBP, Enforcement Integrated Database (EID), November 2013

Table 3.

Aliens Determined Inadmissible by Mode of Travel, Country of Citizenship, and Field Office: Fiscal Years 2011 to 2013

(Ranked by 2013 inadmissible aliens)

Characteristic	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
MODE OF TRAVEL						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Land	103,480	50.7	100,341	51.8	107,205	50.5
Sea	51,568	25.3	52,509	27.1	66,227	31.2
Air	49,060	24.0	40,756	21.1	38,802	18.3
COUNTRY						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Mexico	56,267	27.6	58,658	30.3	67,410	31.8
Canada	29,397	14.4	30,731	15.9	32,141	15.1
Philippines	23,389	11.5	22,486	11.6	25,197	11.9
Cuba	17,679	8.7	12,253	6.3	7,759	3.7
China, People's Republic	13,552	6.6	12,888	6.7	16,931	8.0
India	11,815	5.8	6,907	3.6	5,983	2.8
Ukraine	2,882	1.4	2,928	1.5	4,359	2.1
Russia	2,618	1.3	2,946	1.5	3,905	1.8
Spain	2,423	1.2	1,717	0.9	988	0.5
El Salvador	2,194	1.1	1,028	0.5	853	0.4
All other countries, including unknown	41,902	20.5	41,064	21.2	46,708	22.0
FIELD OFFICE						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Laredo, TX	31,781	15.6	28,005	14.5	25,790	12.2
San Diego, CA	25,632	12.6	26,889	13.9	33,719	15.9
New Orleans, LA	21,011	10.3	20,204	10.4	20,855	9.8
San Francisco, CA	14,939	7.3	9,832	5.1	6,954	3.3
Buffalo, NY	13,425	6.6	14,050	7.3	15,712	7.4
Houston, TX	10,909	5.3	12,706	6.6	19,528	9.2
Tucson, AZ	9,991	4.9	7,612	3.9	7,951	3.7
Pre-Clearance*	9,695	4.7	8,559	4.4	8,586	4.0
Seattle, WA	9,343	4.6	10,529	5.4	10,650	5.0
Miami, FL	8,684	4.3	7,593	3.9	6,896	3.2
All other field offices, including unknown	48,608	23.9	47,627	24.6	55,593	26.2

*Refers to field offices abroad.

Source: U.S. Department of Homeland Security, Customs and Border Protection, Office of Field Operations, Enforcement Integrated Database (EID), October 2013.

Table 4.

Notices to Appear Issued by Homeland Security Office: Fiscal Years 2011 to 2013

(Ranked by 2013 notices to appear)

Homeland Security office	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	224,185	100.0	235,687	100.0	250,127	100.0
ICE Enforcement and Removal Operations	101,571	45.3	140,707	59.7	156,208	62.5
United States Citizenship and Immigration Services	56,896	25.4	41,778	17.7	44,638	17.8
CBP U.S. Border Patrol	42,078	18.8	31,506	13.4	31,739	12.7
CBP Office of Field Operations	23,640	10.5	21,696	9.2	17,542	7.0

Source: U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol, November 2013; ICE Enforcement and Removal Operations, October 2013; CBP Office of Field Operations, October 2013; United States Citizenship and Immigration Services, NTA Database, May 2014

Southwest Border Apprehensions. Apprehensions by the USBP along the Southwest border increased 16 percent from 356,873 in 2012 to 414,397 in 2013. Rio Grande Valley was the leading sector for apprehensions (154,453) and displayed the highest increase from 2012 to 2013 (56,691 or 58 percent) (see Table 2). The next leading sectors in 2013 were Tucson (120,939) Laredo (50,749), San Diego (27,496), and Del Rio (23,510).

Inadmissible Aliens

CBP Office of Field Operations (OFO) determined 204,108 aliens arriving at a port of entry were inadmissible in 2013, up 5.4 percent from 193,606 in 2012 (See Table 3). Fifty-one percent of all inadmissible aliens in 2013 were processed at land ports, followed by 25 percent at sea ports, and 24 percent at airports.

Nationality of Inadmissible Aliens. Mexican nationals accounted for 28 percent of inadmissible aliens in 2013, followed by Canada (14 percent) and the Philippines (12 percent). Other leading countries included Cuba, China, India, Ukraine, Russia, Spain and El Salvador. The greatest increases from 2012 to 2013 were for nationals of El Salvador (113 percent) and India (71 percent) (see Table 3).

Notices to Appear

DHS issued 224,185 NTAs in 2013, down from 235,687 in 2012 (see Table 4). ICE ERO issued 101,571 or 45 percent of all NTAs in 2013, down from 140,707 or 60 percent in 2012. NTAs issued by USCIS accounted for 25 percent of all NTAs in 2013, up from 18 percent in 2012, partly due to an increase in the number of "Credible Fear" issued NTAs. USBP issued NTAs accounted for 19 percent of all NTAs in 2013, up from

14 percent in 2012. OFO issued 11 percent of NTAs in 2013 and 9 percent in 2012.

Table 5.

Initial Admissions to ICE Detention Facilities by Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 detention admissions)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	440,557	100.0	477,523	100.0	429,247	100.0
Mexico	244,585	55.5	307,523	64.4	288,581	67.2
Guatemala	59,189	13.4	50,723	10.6	38,450	9.0
Honduras	50,609	11.5	40,469	8.5	26,416	6.2
El Salvador	40,261	9.1	31,286	6.6	23,792	5.5
Ecuador	4,716	1.1	3,856	0.8	2,957	0.7
India	4,057	0.9	1,522	0.3	3,438	0.8
Dominican Republic	3,537	0.8	4,265	0.9	4,201	1.0
Haiti	2,382	0.5	1,609	0.3	1,775	0.4
Nicaragua	2,323	0.5	2,131	0.4	2,015	0.5
Jamaica	1,933	0.4	2,365	0.5	2,597	0.6
All other countries, including unknown	26,965	6.1	31,774	6.7	35,025	8.2

Note: Excludes Office of Refugee Resettlement and Mexican Interior Repatriation Program facilities.

Source: U.S. Department of Homeland Security, ENFORCE Alien Detention Module (EADM), October 2013.

Table 6.

Aliens Removed by Component: Fiscal Years 2011 to 2013

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
ICE	330,651	75.4	345,628	82.6	314,453	81.2
CBP U.S. Border Patrol	86,253	19.7	51,012	12.2	42,952	11.1
CBP Office of Field Operations	21,517	4.9	21,757	5.2	29,729	7.7

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Table 7.

Trends in Total Removals, Expedited Removals, and Reinstatements of Final Removal Orders: Fiscal Years 2011 to 2013

Removals	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
Expedited Removals	193,032	44.0	163,308	39.0	122,236	31.6
Reinstatements	170,247	38.8	146,044	34.9	124,784	32.2
All other removals	75,142	17.1	109,045	26.1	140,114	36.2

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Detentions

ICE detained 440,557 aliens during 2013, a decrease of 8 percent from 2012 (See Table 5). Mexican nationals accounted for 56 percent of total detainees in 2013, down from 64 percent in 2012. The next leading countries in 2013 were Guatemala (13 percent), Honduras (12 percent) and El Salvador (9 percent). These four countries accounted for 90 percent of all detainees in 2013.

Removals and Returns

Total Removals. The number of removals increased from 418,397 in 2012 to an all-time high of 438,421 in 2013 (see Tables 6, 7 and Figure 2). ICE accounted for 75 percent of all removals in 2013, down from 83 percent in 2012. USBP accounted for 20 percent of all

removals in 2013, up from 12 percent in 2012. OFO performed 4.9 percent of removals in 2013 and 5.2 percent in 2012 (see table 6). Mexican nationals accounted for 72 percent of all aliens removed in 2013. The next leading countries were Guatemala (11 percent), Honduras (8.3 percent) and El Salvador (4.7 percent). These four countries accounted for 96 percent of all removals in 2012 (see Table 8).

Expedited Removals. Expedited removals represented 44 percent of all removals in 2013, up from 39 percent in 2012 but down from an all-time high of 49 percent in 1999. Aliens from Mexico accounted for 75 percent of expedited removals in 2013. The next leading countries were Guatemala, Honduras, and El Salvador. Nationals from these four countries accounted for 98 percent of all expedited removals in 2013.

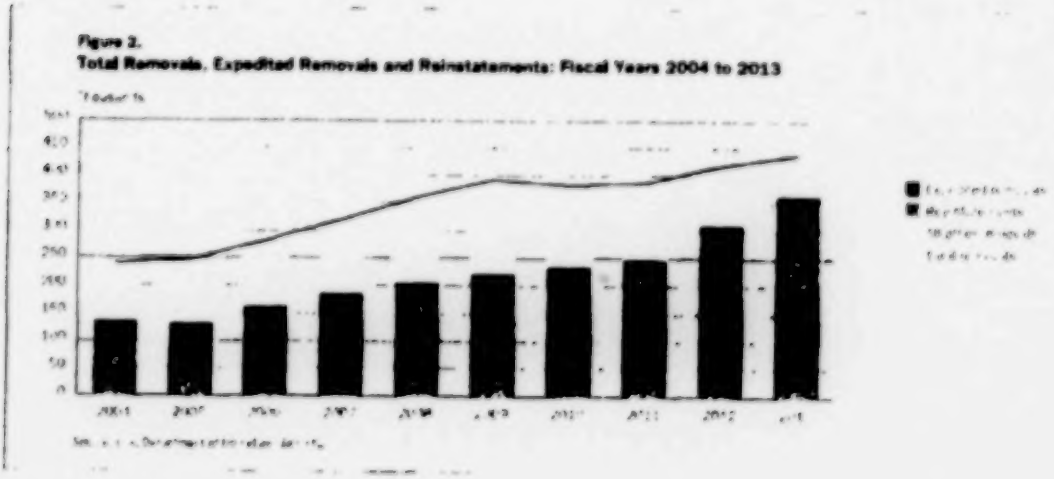

Table 8.

Aliens Removed by Criminal Status and Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 aliens removed)

Country of nationality	2013			2012			2011		
	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal
Total	438,421	198,394	240,027	418,397	200,143	218,254	387,134	188,964	198,170
Mexico	314,904	146,298	168,606	303,745	151,444	152,301	288,078	145,133	142,945
Guatemala	46,866	15,365	31,501	38,900	13,494	25,406	30,343	11,718	18,625
Honduras	36,526	16,609	19,917	31,740	13,815	17,925	22,027	10,825	11,202
El Salvador	20,862	9,440	11,422	18,993	8,674	10,319	17,381	8,507	8,874
Dominican Republic	2,278	1,805	473	2,868	2,182	686	2,893	2,142	751
Ecuador	1,491	580	911	1,763	706	1,057	1,716	704	1,012
Colombia	1,421	956	465	1,591	1,055	536	1,899	1,048	851
Brazil	1,411	366	1,045	2,397	424	1,973	3,350	550	2,800
Nicaragua	1,337	691	646	1,400	731	669	1,502	696	806
Jamaica	1,101	993	108	1,319	1,150	169	1,474	1,225	249
All other countries, including unknown	10,224	5,291	4,933	13,681	6,468	7,213	16,471	6,416	10,055

* Refers to persons removed who have a prior criminal conviction.

Note: Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Reinstatements. Reinstatements of previous removal orders accounted for 39 percent of all removals in 2013. The number of removals based on a reinstatement of final orders increased every year between 2005 and 2013. In 2013, aliens from Mexico accounted for 75 percent of all reinstatements. Other leading countries included Guatemala, Honduras, and El Salvador. These four countries accounted for 99 percent of all reinstatements in 2013.

Criminal Activity. Approximately 198,000 aliens removed in 2013 had a prior criminal conviction.[10] The most common categories of crime were immigration-related offenses, dangerous drugs, criminal traffic offenses, and assault. Immigration-related offenses increased 31 percent from 2012 to 2013 and 65 percent between 2011 and 2013. Dangerous drugs and criminal traffic offenses decreased 28 and 35 percent respectively from 2012 to 2013. These four leading categories accounted for 72 percent of all criminal alien removals in 2013 (see Table 9).

Returns. In 2013, 178,371 aliens were returned to their home countries without an order of removal, a decline of 23 percent from 2012 and the lowest number since 1967 (see Table 10). 2013 was the ninth consecutive year in which returns declined. Fifty-nine percent of returns were performed by OFO in 2013, up from 48 percent in 2012. USBP accounted for 22 percent of all returns in 2013, down from 25 percent in 2012. From 2011 to 2013, returns by USBP decreased 66 percent. ICE accounted for the remaining 20 per-

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[10] Excludes criminals removed by CBP; CBP EID data do not identify if aliens removed were criminals.

cent of returns in 2013, down from 27 percent in 2012. Mexican nationals accounted for 49 percent of all returns in 2013, down from 57 percent in 2012. The next leading countries of nationality for returns in 2013 were Canada (13 percent), the Philippines (12 percent) and China (6.6 percent) (see Table 11).

FOR MORE INFORMATION

For more information about immigration and immigration statistics, visit the Office of Immigration Statistics Website at www.dhs.gov/immigration-statistics.

Table 9.

Criminal Aliens Removed by Crime Category: Fiscal Years 2011 to 2013

(Ranked by 2013 criminal aliens removed)

Crime Category	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	198,394	100.0	200,143	100.0	188,964	100.0
Immigration*	62,194	31.3	47,616	23.8	37,606	19.9
Dangerous Drugs**	30,603	15.4	42,679	21.3	43,378	23.0
Criminal Traffic Offenses†	29,844	15.0	46,162	23.1	43,154	22.8
Assault	20,181	10.2	13,045	6.5	12,783	6.8
Burglary	5,505	2.8	3,569	1.8	3,808	2.0
Weapon Offenses	5,296	2.7	2,513	1.3	2,730	1.4
Larceny	5,290	2.7	5,428	2.7	5,728	3.0
Fraudulent Activities	5,179	2.6	3,879	1.9	4,232	2.2
Sexual Assault	3,166	1.6	3,353	1.7	3,576	1.9
Forgery	3,032	1.5	2,430	1.2	2,858	1.5
All other categories, including unknown	28,104	14.2	29,469	14.7	29,111	15.4

* Including entry and reentry, false claims to citizenship, and alien smuggling.

** Including the manufacturing, distribution, sale, and possession of illegal drugs.

† Including hit and run and driving under the influence.

Notes: Data refers to persons removed who have a prior criminal conviction. Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014.

Table 10.

Aliens Returned by Component: Fiscal Years 2011 to 2013

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
CBP Office of Field Operations.	104,300	58.5	109,468	47.5	130,996	40.7
CBP U.S. Border Patrol .	38,779	21.7	58,197	25.3	113,886	35.4
ICE .	35,292	19.8	62,721	27.2	77,242	24.0

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014. Enforcement Integrated Database (EID), November 2013.

Table 11.

Aliens Returned by Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 aliens returned)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
Mexico	88,042	49.4	131,983	57.3	205,158	63.7
Canada	23,963	13.4	27,039	11.7	28,274	8.8
Philippines	21,523	12.1	20,903	9.1	23,150	7.2
China, People's Republic	11,684	6.6	11,780	5.1	16,234	5.0
Ukraine	2,604	1.5	2,589	1.1	4,111	1.3
India	2,462	1.4	3,273	1.4	4,136	1.3
Russia	1,991	1.1	2,464	1.1	3,512	1.1
Burma	1,920	1.1	2,337	1.0	2,582	0.8
Guatemala	1,347	0.8	2,332	1.0	3,026	0.9
Korea, South	1,259	0.7	1,191	0.5	1,619	0.5
All other countries, including unknown	21,576	12.1	24,495	10.6	30,322	9.4

Note: Returns are the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

APPENDIX

ENFORCEMENT PROGRAM OFFICES

U.S. Customs and Border Protection (CBP)

Office of Field Operations

CBP's Office of Field Operations (OFO) is responsible for securing the U.S. border at ports of entry while facilitating lawful trade and travel. CBP officers determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry.

U.S. Border Patrol

The primary mission of the U.S. Border Patrol (USBP) is to secure approximately 7,000 miles of international land border with Canada and Mexico and 2,600 miles of coastal border of the United States. Its major objectives are to deter, detect, and interdict the illegal entry of aliens, terrorists, terrorist weapons, and other contraband into the United States. USBP operations are divided into geographic regions referred to as sectors.

U.S. Immigration and Customs Enforcement (ICE)

Homeland Security Investigations

The U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Directorate is a critical asset in the ICE mission, responsible for disrupting and dismantling transnational criminal threats facing the United States. HSI uses its legal authorities to investigate immigration and customs violations such as: human rights violations; narcotics; weapons smuggling and the smuggling of other types of contraband; financial crimes; cyber crimes; human traf-

ficking; child pornography; intellectual property violations; commercial fraud; export violations; and identity and benefit fraud. HSI special agents also conduct national security investigations aimed at protecting critical infrastructure vulnerable to sabotage, attack, or exploitation. In addition to domestic HSI criminal investigations, HSI oversees ICE's international affairs operations and intelligence functions.

Enforcement and Removal Operations

Officers and agents of ICE Enforcement and Removal Operations (ERO) serve as the primary enforcement arm within ICE for the identification, apprehension, and removal of certain aliens from the United States. ERO transports removable aliens, manages aliens in custody or subject in conditions of release, and removes individuals ordered to be removed from the United States.

U.S. Citizenship and Immigration Services (USCIS)

U.S. Citizenship and Immigration Services (USCIS) oversees lawful immigration to the United States and processes applications for immigration benefits within the United States. USCIS provides accurate and useful information to its customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the immigration system.

ICE Enforcement and Removal Operations Report

Fiscal Year 2014

Dec. 19, 2014

[SEAL OMITTED] Homeland Security

U.S. Immigration and Customs Enforcement

I. Background

This report summarizes U.S. Immigration and Customs Enforcement's (ICE) Fiscal Year (FY) 2014 civil immigration enforcement and removal operations. ICE shares responsibility for enforcing the Nation's civil immigration laws with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). In executing its enforcement duties, ICE focuses on two core missions: (1) identifying and apprehending public safety threats—including criminal aliens and national security targets—and other removable individuals within the United States; and (2) detaining and removing individuals apprehended by ICE and CBP officers and agents patrolling our Nation's borders.

Each year, ICE immigration enforcement is impacted by operational factors, including the size of the removable population found in the interior and encountered at the border by CBP, appropriated resources, fluctuating migration patterns, and the legal authorities that govern ICE's activities. In 2014, each of these factors affected ICE operations and contributed to the number of ICE's FY 2014 removals, which was 315,943, down from 368,644 in FY 2013. This report sets forth and analyzes ICE's FY 2014 immigration enforcement statistics.

II. Discussion

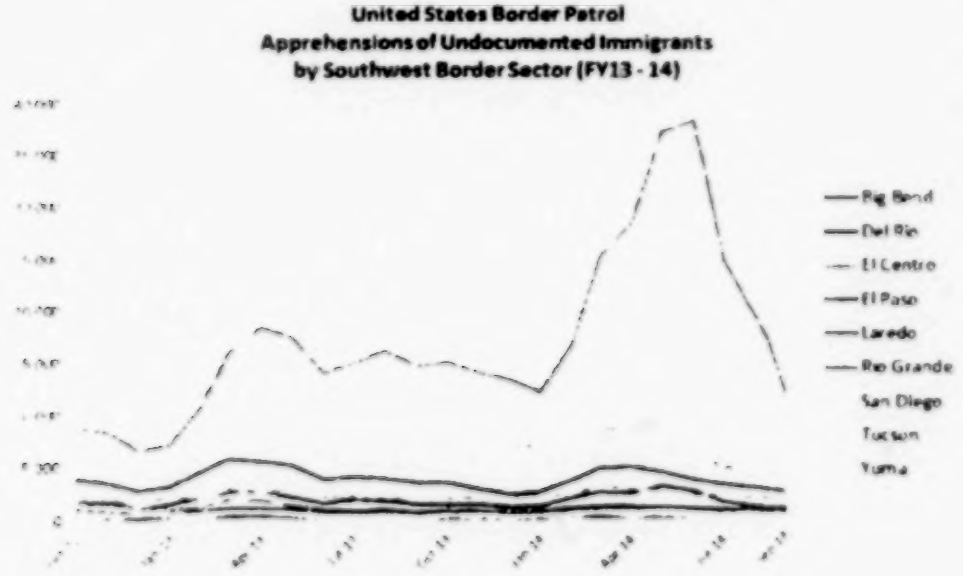
Shifting Migration Patterns and Demographics

In FY 2014, the surge of illegal border crossings in the Rio Grande Valley (RGV) in South Texas and significant increase in Central American migrants presented

unique challenges to ICE's immigration enforcement efforts.

The Surge in the Rio Grande Valley

In 2014, the United States experienced an unprecedented surge of illegal border crossings in the RGV, particularly by unaccompanied children and family units from Central America. CBP apprehensions in the RGV—a sector containing just 320 miles of our 2,000 mile border with Mexico—accounted for 72.8 percent of the unaccompanied children and 76.2 percent of the family units apprehended in FY 2014. In FY 2013, the Border Patrol apprehended a total of 21,553 unaccompanied children and 7,265 family units in the RGV. In 2014 those numbers were 49,959 and 52,326, respectively. In June alone, at the height of the surge, the Border Patrol apprehended 8,730 unaccompanied children and 13,370 family units in the RGV, which placed significant strain on a number of DHS resources and operations, including ICE.



As part of DHS's response to this unprecedented migration, and to stem the tide, in FY 2014, ICE devoted significant resources, both transportation assets and ICE Enforcement and Removal Operations (ERO) officers, to transfer 56,029 unaccompanied children apprehended at the southwest border to the Department of Health and Human Services (HHS), as the law requires. While these unaccompanied children did not occupy ICE detention space, they required ICE to reallocate resources, including officer time, to support DHS's response to this urgent humanitarian situation. For example, approximately 800 ERO officers and support personnel (over 10 percent of ERO's entire workforce) were detailed to support southwest border operations.

The significant increase in illegal migration of unaccompanied children and family units also contributed to operational challenges for ICE. ICE does not detain unaccompanied children. Under the law, ICE is required to transfer unaccompanied children to HHS, generally within 72 hours. HHS then becomes responsible for their care and is required by law to place unaccompanied minors in the least restrictive setting that is in the best interest of the child, which generally results in placement with a family member. Unlike adults apprehended at the border who are placed into expedited removal, the law requires that unaccompanied children be placed in removal proceedings before an immigration judge (as opposed to expedited removal). These cases are placed on the non-detained immigration court docket, and due to a number of factors, generally take significantly longer to be adjudicated than those of adults.

Like single adults, family units apprehended at the border may be placed into expedited removal proceedings and detained. However, this process requires ICE to maintain an increased level of family detention space, which historically has been limited to fewer than 100 beds nationwide. ICE cannot detain family units, including children, in adult detention facilities. As a result, in the summer ICE sought substantial resources and authority to build additional detention capacity to detain and remove family units, and since then ICE has opened three additional facilities for this purpose. All of these efforts required ERO officer time, support personnel, and significant funding.

At the height of the surge, in order to sustain ICE and CBP response efforts, the President submitted an emergency supplemental funding request to Congress to help address these unique and urgent challenges, including significantly increased ICE detention capacity for family units and ICE transportation resources for unaccompanied children. That request was not acted upon, and as a result DHS was required to reprogram funds from other key homeland security priorities. In doing so, and coupled with a broader public messaging campaign and sustained foreign counterpart engagement, DHS efforts helped contribute to dramatically reducing migration in the RGV, down to 1,491 unaccompanied children and 1,704 family units apprehended in September, the last month of the fiscal year. However, ICE and DHS components remain vigilant and will continue to work with Congress and our interagency and foreign counterparts to sustain our progress.

The Spike of Central Americans

In addition to the surge of unaccompanied children and family units, between FY 2013 and FY 2014, ICE experienced another key demographic shift in the population of the individuals it detained and removed. Specifically, ICE removals of Mexican nationals decreased from 66 to 56 percent of total ICE removals during this period. At the same time, the number of aliens removed to El Salvador, Guatemala, and Honduras increased by 15 percent due to the increased share of apprehensions involving such nationals at the border. Removals of individuals at the border from countries other than Mexico increased 26 percent.

Removal of nationals to non-contiguous countries are far more costly, take significantly more time, and require added officer resources as compared to removals of Mexican nationals. Instead of quickly returning Mexican nationals apprehended at the border, ICE must take custody of Central Americans and other individuals from non-contiguous countries, detain them, obtain travel documents from the host country, and expend transportation and flight resources.

FY 2014 Demographic Shift for ICE Removals

COUNTRY	FY 2013	FY 2014
El Salvador	21,602	27,180
Guatemala	47,749	54,423
Honduras	37,049	40,695
Mexico	241,493	176,968

Increasing Jurisdictions Declining to Honor ICE Detainers

In the interior, ICE successfully focused its enforcement actions on criminals; 85 percent of interior enforcement removals were of convicted criminals. ICE's efforts in the interior, however, were impacted by an increasing number of state and local jurisdictions that are declining to honor ICE detainers.[1] As a result, instead of state and local jails transferring criminal aliens in their custody to ICE for removal, such aliens were released by state and local authorities. Since January 2014, state and local law enforcement authorities declined to honor 10,182 detainers.[2] This required ICE to expend additional resources attempting to locate, apprehend, and remove criminal aliens who were released into the community, rather than transferred directly into custody. These changes further contributed to decreased ICE removals.

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[1] On November 20, 2014, Secretary Johnson issued a memorandum directing ICE to discontinue the Secure Communities program and replace it with the Priority Enforcement Program (PEP) to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. PEP will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks. But ICE will only seek the transfer of an alien in the custody of such agencies when the alien has been convicted of certain offenses that pose the greatest threat to public safety. *See* Secure Communities Memorandum dated November 20, 2014. *See also* Policies for Apprehension, Detention and Removal of Undocumented Immigrants Memorandum dated November 20, 2014.

[2] ICE began collecting information on declined detainers beginning January 2014.

Refined Focus on Convicted Criminals

In recent years, ICE has increased its focus on identifying, locating, apprehending, and removing convicted criminal aliens who are at-large, requiring significantly more officers, time, money, and other resources as compared to those individuals who are in a custodial setting. In FY 2014, while total criminal removals declined from last year, a significant percentage of ICE's interior removals—85 percent—remained focused on criminal aliens. The substantial share of convicted criminals removed from the interior represents a steady and significant increase from 2008, when that figure was just 38 percent and 2011 when it was 67 percent.[3] ICE's focus on criminal removals in the interior is also reflected in the total number of criminal removals: in FY 2007 and FY 2008, ICE removed 102,024 and 114,415 convicted criminals, respectively, as compared to 216,810 in FY 2013 and 177,960 in 2014. In addition, ICE removed 2,802 individuals in FY 2014 who were classified as suspected or confirmed gang members. As a result, while overall removals declined in FY 2014, ICE has sustained the improved quality of its removals by focusing on the most serious public safety and national security threats.

Reduced Use of the Alien Transfer Exit Program

Key operational changes to the Alien Transfer Exit Program (ATEP) impacted ICE's operations and the removal of Mexican nationals. ATEP is a joint effort between ICE ERO and CBP Border Patrol in which

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[3] Because ICE's crime entry screen did not exist in its systems prior to 2011, the ability to electronically capture and report criminal conviction information prior to 2011 was limited.

Mexican nationals apprehended in one sector of the southwest border are transported for removal through a different sector in order to disrupt the smuggling cycle by separating migrants from their smugglers. In 2013, ICE began reallocating limited resources away from ATEP to focus on the increasing number of Central American migrants and other priorities. In FY 2014, ICE continued to scale back ATEP and re-tasked ATEP-dedicated transportation resources to effectively manage the influx of family units and unaccompanied children apprehended in the RGV. As a result, in FY 2014, the number of ATEP ICE removals dramatically decreased as compared to the 52,965 Mexican nationals removed through ATEP in FY 2013. This contributed to a reduction in total ICE removals in FY 2014. However, the Border Patrol supported ICE's reduction in ATEP transportation resources by removing or voluntarily returning those individuals who would have met the criteria for ATEP.

Legal Requirements

ICE's interior operations were also challenged by federal court decisions, including the decision of the U.S. Court of Appeals for the Ninth Circuit in *Rodriguez* v. *Robbins*, 715 F.3d 1127 (9th Cir. 2013). Under *Rodriguez*, individuals who are detained while in removal proceedings, including those subject to mandatory detention, must be granted individual bond hearings within 180 days of the commencement of immigration detention, regardless of ICE's custody determination. *Rodriguez* applies throughout the Ninth Circuit, the largest federal jurisdiction. As a result, a greater number of individuals have been released on immigration judge-determined bonds and transferred from the

detained docket to the non-detained docket. This has directly impacted removals in the short term because cases on the non-detained docket take longer to adjudicate, and require additional ICE resources.

In addition, ICE relies on the cooperation of foreign governments to effectuate removal of their nationals. ICE often cannot repatriate individuals within the legally prescribed time limits because their countries of origin or nationality fail to issue required travel documents in a timely manner. This occurs despite ICE and Department of State efforts to work with these countries to procure necessary documents. In these cases, ICE is generally required by law to release individuals from custody. Individuals may be released on bond or an order of supervision and may be enrolled in the Alternatives to Detention (ATD) program, which may include GPS monitoring and telephonic reporting. While ICE continues to engage countries that do not cooperate in the timely repatriation of their nationals, their failure to cooperate poses a significant challenge to removals.

In FY 2014:

- ICE conducted 315,943 removals.
- ICE conducted 102,224 removals of individuals apprehended in the interior of the United States.
    - 86,923 (85 percent) of all interior removals involved individuals previously convicted of a crime.

- ICE conducted 213,719 removals of individuals apprehended while attempting to unlawfully enter the United States.[4]
- 56 percent of all ICE removals, or 177,960, involved individuals who were previously convicted of a crime.
    - ICE apprehended and removed 86,923 criminals from the interior of the U.S.
    - ICE removed 91,037 criminals apprehended while attempting to unlawfully enter the United States.
- 98 percent of all ICE FY 2014 removals, or 309,477, clearly met one or more of ICE's stated civil immigration enforcement priorities.[5]
- Of the 137,983 individuals removed who had no criminal conviction, 89 percent, or 122,682, were apprehended at or near the border while attempting to unlawfully enter the country.[6]
- The leading countries of origin for removals were Mexico, Guatemala, Honduras, and El Salvador.

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[4] Approximately 96 percent of these individuals were apprehended by CBP Border Patrol agents and then processed, detained, and removed by ICE. The remaining individuals were apprehended by CBP officers at ports of entry.

[5] As defined in the March 2011 ICE Memorandum: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.

[6] ICE defines criminality via a recorded criminal conviction obtained by ICE officers and agents from certified criminal history repositories. These individuals include recent border crossers, immigration fugitives, and repeat immigration violators.

- 2,802 individuals removed by ICE were classified as suspected or confirmed gang members.[7]

Key Term Definitions

Border Removal: An individual removed by ICE who is apprehended by a CBP officer or agent while attempting to illicitly enter the United States at or between the ports of entry. These individuals are also referred to as recent border crossers.

Criminal Offender: An individual convicted in the United States for one or more criminal offenses. This does not include civil traffic offenses.

Immigration Fugitives: An individual who has failed to leave the United States based on a final order of removal, deportation, or exclusion, or has failed to report to ICE after receiving notice to do so.

Interior Removal: An individual removed by ICE who is identified or apprehended in the United States by an ICE officer or agent. This category excludes those apprehended at the immediate border while attempting to unlawfully enter the United States.

Other Removable Alien: An individual who is not a confirmed convicted criminal, recent border crosser, or other ICE civil enforcement priority category. This category may include individuals removed on national security grounds or for general immigration violations.

[7] Gang affiliation is documented as part of the intake process in the Risk Classification Assessment (RCA).

Previously Removed Alien: An individual previously removed or returned who has re-entered the country illegally.

Reinstatement of Final Removal Order: The removal of an alien based on the reinstatement of a prior removal order, where the alien departed the United States under an order of removal and illegally reentered the United States (INA § 241(a)(5)). The alien may be removed without a hearing before an immigration court.

Removal: The compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An individual who is removed may have administrative or criminal consequences placed on subsequent reentry because of the removal. ICE removals also include voluntary returns, voluntary departures, and withdrawals of admission for cases managed by ICE officers and agents.

Border Removals

In FY 2014, ICE continued to prioritize border security, partnering with CBP to process and remove individuals apprehended while attempting to unlawfully enter the United States.

In FY 2014, ICE conducted 213,179 removals of recent border crossers. Many of those apprehended along the border had prior criminal or civil immigration violations in the United States. Of these recent border crosser removals, 91,037 involved individuals with at least one criminal conviction.

FY 2014 ICE Border Removals by Apprehending Program and Priority			
Apprehending CBP Office	**Level/Priority**		**Removals**
Office of Border Patrol (OBP)	Convicted Criminal	Level 1	17,772
		Level 2	19,733
		Level 3	49,948
	Immigration Fugitives		1,776
	Repeat Immigration Violators		54,115
	Other Border Removals		61,714
	Total OBP		**205,058**
Office of Field Operations (OFO)	Convicted Criminal	Level 1	1,490
		Level 2	866
		Level 3	1,228
	Immigration Fugitives		56
	Repeat Immigration Violators		995
	Other Border Removals		4,026
	Total OFO		**8,661**

Changing Border Apprehension Demographics

In FY 2014, ICE carried out 110,021 border removals of individuals from countries other than Mexico, a 26 percent increase over the 90,461 such individuals removed by ICE in FY 2013. Given this shift in border apprehension demographics, ICE was required in FY 2014 to use more of its detention and removal resources for recent border crossers from countries other than Mexico and Canada—as CBP must rely on ICE to effectuate

the removal of individuals from countries that are not contiguous with the United States.

In FY 2014, Mexico continued to be the leading country of origin for individuals removed, followed by Guatemala, Honduras, and El Salvador.

FY 2014 Top 10 Countries of ICE Removal by Citizenship	
Citizenship	**Total**
Mexico	176,968
Guatemala	54,423
Honduras	40,695
El Salvador	27,180
Dominican Republic	2,130
Ecuador	1,565
Nicaragua	1,266
Colombia	1,181
Jamaica	938
Brazil	850
Total	**307,196**

Interior Apprehensions and Removals

In FY 2014, ICE conducted 102,224 removals of individuals apprehended in the interior of the United States. ICE focused interior enforcement operations on individuals with criminal convictions, emphasizing those convicted of the most serious crimes. Notably, 85 percent of all removals from the interior of the United States involved individuals who were previously convicted of a criminal offense, while 76 percent of the convicted criminals removed from the interior were convicted of an ICE Level 1 or Level 2 offense.

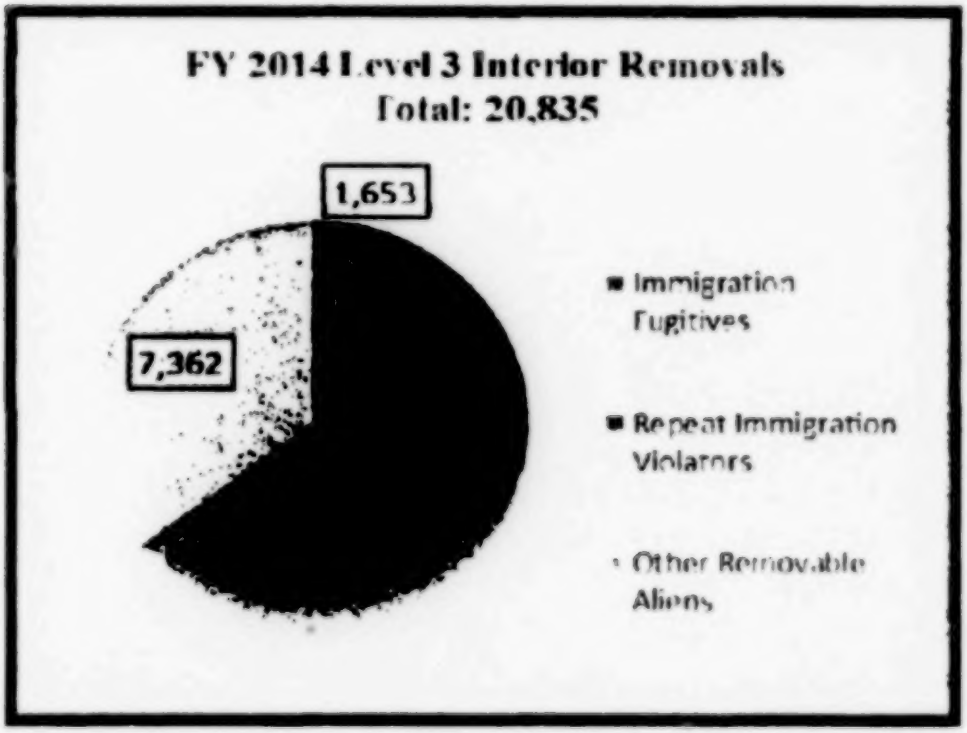
Level 1 offenders are aliens convicted of (1) an "aggravated felony," as defined in § 101(a)(43) of the Immi-

gration and Nationality Act, or (2) two or more crimes each punishable by more than one year, commonly referred to as "felonies." Level 2 offenders are aliens convicted of any other felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors." Level 3 offenders are aliens convicted of "misdemeanor" crime(s) punishable by less than one year.

FY 2014 ICE Interior Criminal Removals by Level		
Level 1	43,897	50.5 percent
Level 2	22,191	25.5 percent
Level 3	20,835	24 percent
Total	86,923	100 percent

Almost two thirds of individuals with criminal convictions who were removed from the interior of the United States also fell into other ICE priority categories. For example, 62 percent of ICE's interior criminal alien removals were previously removed from the United States or were immigration fugitives, and 65 percent of all interior Level 3 removals had been previously removed or were immigration fugitives.

FY 2014 ICE Interior Removals by Priority		
Threat Level/Priority		**Removals**
Convicted Criminal	Level 1	43,897
	Level 2	22,191
	Level 3	20,835
Immigration Fugitives		1,629
Repeat Immigration Violators		7,206
Other Removals		6,466
Total		102,224



Criminal Alien Removals

In FY 2014, approximately 56 percent (177,960) of all ICE removals involved individuals with criminal convictions. Overall, in FY 2014, 63,159 of the convicted criminal removals were Level 1 offenders, 42,790 were Level 2 offenders, and 72,011 were Level 3 offenders.

The majority of Level 1 and Level 2 offenders—62 percent—were apprehended in the interior of the United States. Conversely, 71 percent of all Level 3 offenders were apprehended at or near the border.

Non-Criminal Removals

The vast majority of ICE non-criminal removals in FY 2014 involved individuals encountered by CBP agents and officers while trying to unlawfully enter the United States. Specifically, 89 percent (122,682) of ICE's 137,983 non-criminal removals involved individuals attempting to unlawfully enter the United States. A full 95 percent of ICE's non-criminal removals involved recent border crossers, repeat immigration violators, or immigration court fugitives.

III. Appendix A: FY 2014 Removals by Citizenship

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Mexico	176,968
Guatemala	54,423
Honduras	40,695
El Salvador	27,180
Dominican Republic	2,130
Ecuador	1,565
Nicaragua	1,266
Colombia	1,181
Jamaica	938
Brazil	850
Peru	678
China	534
Canada	457
Haiti	382
India	359
Philippines	302
Nigeria	261
Costa Rica	245
United Kingdom	213
Poland	159
Trinidad and Tobago	158
South Korea	154
Venezuela	153
Romania	143
Guyana	136
Belize	123
Spain	121
Kenya	113
Russia	112
Bahamas	110

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Saudi Arabia	105
Argentina	101
Pakistan	98
Ukraine	96
Ghana	91
Italy	91
France	87
Bolivia	85
Israel	83
Korea	83
Jordan	80
Germany	77
Cambodia	75
Panama	73
Indonesia	71
Chile	69
Bangladesh	66
Somalia	65
Portugal	64
Micronesia	63
Egypt	62
Hungary	60
Turkey	60
Bosnia-Herzegovina	53
Lebanon	53
Thailand	52
Albania	50
Vietnam	48
Uruguay	45
Nepal	44
Morocco	43

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
South Africa	42
Australia	41
Netherlands	39
Uzbekistan	39
Czech Republic	34
Japan	34
Bulgaria	33
Ireland	33
Latvia	32
Ethiopia	31
Lithuania	31
Marshall Islands	31
Sri Lanka	31
Tanzania	31
Armenia	30
Cameroon	30
Greece	30
Iraq	29
Taiwan	29
Tonga	29
Moldova	26
Cuba	24
Iran	23
Kazakhstan	23
Mongolia	23
Afghanistan	22
Georgia	22
Uganda	22
Malaysia	21
Kyrgyzstan	20
St. Vincent Grenadines	19

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Belarus	18
Fiji	18
New Zealand	18
Senegal	18
Liberia	17
St. Kitts-Nevis	17
Sweden	17
Barbados	16
Dominica	16
Mali	16
Slovakia	16
Unknown	16
Antigua-Barbuda	15
Hong Kong	15
Palau	15
Yemen	15
Sudan	14
Angola	13
Guinea	13
Grenada	12
Macedonia	12
Paraguay	12
Serbia	12
Sierra Leone	12
Singapore	12
St. Lucia	12
Tunisia	12
Ivory Coast	11
Libya	11
Congo	10
Kosovo	10

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Niger	10
Zambia	10
Zimbabwe	10
Azerbaijan	9
Belgium	9
Cape Verde	9
Czechoslovakia	9
Samoa	9
South Sudan	9
Syria	9
Estonia	8
British Virgin Islands	7
Gambia	7
Mauritania	7
Montenegro	7
Norway	7
Tajikistan	7
Bermuda	6
Burkina Faso	6
Dem Rep of the Congo	6
Denmark	6
Kuwait	6
Switzerland	6
Togo	6
Benin	5
Burma	5
Croatia	5
Slovenia	5
Suriname	5
Yugoslavia	5
Algeria	4

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Austria	4
Burundi	4
Equatorial Guinea	4
Gabon	4
Malawi	4
Oman	4
Botswana	3
Cayman Islands	3
Finland	3
Iceland	3
Laos	3
Namibia	3
Netherlands Antilles	3
Turkmenistan	3
Turks and Caicos Islands	3
Chad	2
Cyprus	2
Mauritius	2
Rwanda	2
United Arab Emirates	2
USSR[8]	2
Andorra	1
Bahrain	1
Comoros	1
Eritrea	1
French Guiana	1

[8] Denotes aliens subject to removal who are nationals of countries that were member states of the Union of Soviet Socialist Republics (USSR), but who did not become citizens of the Russian Federation after the dissolution of the USSR.

FY 2014 ICE Removals by Citizenship	
Citizenship	**Total**
Guadeloupe	1
Guinea-Bissau	1
Macau	1
Madagascar	1
Malta	1
Monaco	1
Montserrat	1
Papua New Guinea	1
San Marino	1
Total	**315,943**

Appendix B: Methodology

Data Source:

Data used to report ICE statistics are obtained through the ICE Integrated Decision Support (IIDS) system data warehouse.

Data Run Dates

FY 2014: IIDS v1.16 run date 10/05/2014; ENFORCE Integrated Database (EID) as of 10/03/2014

FY 2013: IIDS v1.14 run date 10/06/2013; EID as of 10/04/2013

FY 2012: IIDS v1.12 run date 10/07/2012; EID as of 10/05/2012

FY 2011: IIDS run date 10/07/2011; EID as of 10/05/2011

FY 2010: IIDS run date 10/05/2010; EID as of 10/03/2010

FY 2009: Removals and Returns are an adjusted historical number of an IIDS run date of 8/16/2010 (EID as of 8/14/10) and will remain static.

Removals

Removal data is historical and remains static. Removals include Returns. Returns include Voluntary Returns, Voluntary Departures, and Withdrawals Under Docket Control.

In FY 2009, ICE began to "lock" removal statistics on October 5 at the end of each fiscal year, and counted only aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5 were excluded

from the locked data, and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will count removals and returns confirmed after October 5 toward the next fiscal year. FY 2012 removals, excluding FY 2011 "lag," were 402,919. FY 2013 removals, excluding FY 2012 "lag," were 363,144. FY 2014 removals, excluding FY 2013 "lag," were 311,111.

Fiscal Year Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until the fiscal year after the data is locked. Since data from the previous fiscal year are locked, the removal is recorded in the month the case was closed and reported in subsequent fiscal year removals. This will result in a higher number of recorded removals in a fiscal year than actual departures.

Any voluntary return on or after June 1, 2013 without an ICE intake case will not be recorded as an ICE removal.

ERO Removals include aliens processed for Expedited Removal (ER) and turned over to ERO for detention. Aliens processed for ER and not detained by ERO are primarily processed by Border Patrol. CBP should be contacted for those statistics.

Gang affiliation is documented as part of the intake process in the Risk Classification Assessment (RCA).

FY 2012 – FY 2013 Removals include ATEP removals.

Criminality

ICE Levels reflect priorities outlined in the June 2010 memorandum entitled "ICE Civil Immigration En-

forcement Priorities effective October 1, 2010." Since FY 2011, ICE has defined criminality as a recorded criminal conviction from certified criminal history repositories. To prioritize the removal of convicted criminal aliens, ICE personnel refer to the following offense levels: Level 1, Level 2, and Level 3 offenders. Level 1 offenders are aliens convicted of "aggravated felonies," as defined in § 101(a)(43) of the Immigration and Nationality Act, or two or more crimes, each punishable by more than one year, commonly referred to as "felonies." Level 2 offenders are aliens convicted of any other felony or three or more crimes, each punishable by less than one year, commonly referred to as "misdemeanors." Level 3 offenders are aliens convicted of "misdemeanor" crime(s) punishable by less than one year. Prior to FY 2011, ICE used Secure Communities (SC) Levels 1, 2, and 3 for prioritization purposes.

U.S. Citizenship & Immigration Services
Deferred Action for Childhood Arrivals
(DACA) Toolkit (excerpts)

* * * * *

I was admitted for "duration of status" but my status in SEVIS is listed as terminated on or before June 15, 2012. May I be considered for deferred action under this process?

YES. For the purposes of satisfying the "had no lawful status on June 15, 2012," guideline alone, if your status as of June 15, 2012, is listed as "terminated" in SEVIS, you may be considered for deferred action under this process.

I am a Canadian citizen who was inspected by CBP but was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

In general, a Canadian citizen who was admitted as a visitor for business or pleasure and not issued an I-94, Arrival/Departure Record, (also known as a "non-controlled" Canadian nonimmigrant) is lawfully admitted for a period of 6 months. For that reason, unless there is evidence, including verifiable evidence provided by the individual, that he or she was specifically advised that his or her admission would be for a different length of time, the Department of Homeland Security (DHS) will consider, for DACA purposes only, that the alien was lawfully admitted for a period of 6 months. Therefore, if DHS is able to verify from its records that your last non-controlled entry occurred on or before Dec. 14, 2011, DHS will consider your nonimmigrant visitor status to have expired as of June

15, 2012, and you may be considered for deferred action under this process.

I used my Border Crossing Card (BCC) to obtain admission to the United States and was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

Because the limitations on entry for a BCC holder vary based on location of admission and travel, DHS will assume that the BCC holder who was not provided an I-94 was admitted for the longest period legally possible—30 days—unless the individual can demonstrate, through verifiable evidence, that he or she was specifically advised that his or her admission would be for a different length of time. Accordingly, if DHS is able to verify from its records that your last admission was using a BCC, you were not issued an I-94 at the time of admission, and it occurred on or before May 14, 2012, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012, and you may be considered for deferred action under this process.

Do I accrue unlawful presence if I have a pending initial request for consideration of DACA?

You will continue to accrue unlawful presence while the request for consideration of DACA is pending unless you are under 18 years of age at the time of the request. If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS. If action on your case is deferred, you will not accrue unlawful presence during the period of deferred action.

However, having action deferred on your case will not excuse previously accrued unlawful presence.

RENEWAL OF DACA

When should I file my renewal request with U.S. Citizenship and Immigration Services (USCIS)?

USCIS encourages you to submit your request for renewal approximately 120 days (or 4 months) before your current period of deferred action under the Deferred Action for Childhood Arrivals (DACA) process expires. If you have filed approximately 120 days before your deferred action and Employment Authorization Document (EAD) expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time until your renewal is adjudicated. However, if you file your renewal request more than 150 days prior to the expiration of your current period of deferred action, USCIS may reject your submission and return it to you with instructions to resubmit your request closer to the expiration date.

How will USCIS evaluate my request for renewal of DACA?

You may be considered for renewal of DACA if you met the guidelines for consideration of Initial DACA (see above) AND you:

1. Did not depart the United States on or after Aug. 15, 2012, without advance parole;
2. Have continuously resided in the United States since you submitted your most recent request

for DACA that was approved up to the present time; and

3. Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA renewal. USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Do I accrue unlawful presence if I am seeking renewal and my previous period of DACA expires before I receive a renewal of deferred action under DACA? Similarly, what would happen to my work authorization?

YES, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request.

Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until and unless you receive a new employment authorization document from USCIS.

However, if you have filed your renewal request with USCIS approximately 120 days before your deferred action and EAD expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS

may provide deferred action and employment authorization for a short period of time.

Do I need to provide additional documents when I request renewal of deferred action under DACA?

NO, unless you have new documents pertaining to removal proceedings or criminal history that you have not already submitted to USCIS in a previously approved DACA request. USCIS, however, reserves the authority to request at its discretion additional documents, information, or Statements relating to a DACA renewal request determination.

CAUTION: If you knowingly and willfully provide materially false information on Form I-821D, you will be committing a Federal felony punishable by a fine, or imprisonment up to 5 years, or both, under 18 U.S.C. Section 1001. In addition, individuals may be placed into removal proceedings, face severe penalties provided by law, and be subject to criminal prosecution.

TRAVEL

May I travel outside of the United States before I submit an initial Deferred Action for Childhood Arrivals (DACA) request or while my initial DACA request remains pending with the Department of Homeland Security (DHS)?

Any unauthorized travel outside of the United States on or after Aug. 15, 2012, will interrupt your continuous residence and you will not be considered for deferred action under this process. Any travel outside of the United States that occurred on or after June 15, 2007, but before Aug. 15, 2012, will be assessed by U.S. Citizenship and Immigration Services (USCIS) to de-

termine whether the travel qualifies as brief, casual, and innocent. **(See Chart #2 on the following page.)**

CAUTION: You should be aware that if you have been ordered deported or removed, and you then leave the United States, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.

If my case is deferred under DACA, will I be able to travel outside of the United States?

Not automatically. If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a **Form I-131, Application for Travel Document** and paying the applicable fee ($360). USCIS will determine whether your purpose for international travel is justifiable based on the circumstances you describe in your request. Generally, USCIS will only grant advance parole * * *

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[SEAL OMITTED]

Congressional Research Service

MEMORANDUM July 13, 2012

To: Prepared for Distribution to Multiple Congressional Requesters

From: Andorra Bruno, Specialist in Immigration Policy, 7-7865
Todd Garvey, Legislative Attorney, 7-0174
Kate Manuel, Legislative Attorney, 7-4477
Ruth Ellen Wasem, Specialist in Immigration Policy, 7-7342

Subject: **Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children***

This Congressional Research Service (CRS) memorandum provides background and analysis related to the memorandum issued by the Department of Homeland Security (DHS) on June 15, 2012, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.* Under the DHS directive, certain individuals who were brought to the United States as children and meet other criteria will be considered for relief from removal. Intended to respond to a variety of congressional requests on the policy set forth in the DHS memorandum, this CRS memorandum discusses the content of the June 15, 2012 memorandum, as well as the unauthorized alien student issue and related DREAM Act legislation, past administrative exercises of prosecutorial discretion to provide relief from removal, the legal

authority for the actions contemplated in the DHS memorandum, and other related issues. For further information, please contact Andorra Bruno (unauthorized students and the DREAM Act), Todd Garvey (constitutional authority), Kate Manuel (other legal issues), or Ruth Wasem (antecedents of deferred departure and access to federal benefits).

Overview of Unauthorized Alien Students

The unauthorized alien (noncitizen) population includes minors and young adults who were brought, as children, to live in the United States by their parents or other adults. These individuals are sometimes referred to as "Unauthorized alien students," or, more colloquially, as "DREAM Act kids" or "DREAMers."

While living in the United States, unauthorized alien children are able to receive free public education through high school.[1] Many unauthorized immigrants who graduate from high school and want to attend college, however, find it difficult to do so. One reason for this is that they are ineligible for federal student financial aid.[2] Another reason relates to a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[3] that discourages states and localities from granting unauthor-

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[1] The legal authority for disallowing state discrimination against unauthorized aliens in elementary and secondary education is the 1982 Supreme Court decision in Plyler v. Doe. See also CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

[2] Higher Education Act (HEA) of 1965 (P.L. 89-329), as amended, November 8, 1965, 20 U.S.C. § 1001 *et seq.*

[3] IIRIRA is Division C of P.L. 104-208, September 30, 1996.

ized aliens certain "postsecondary education benefits" (referred to here as the "1996 provision").[4] More broadly, as unauthorized aliens, they are typically unable to work legally and are subject to removal from the United States.[5]

According to DHS estimates, there were 1.4 million unauthorized alien children under age 18 living in the United States in January 2011. In addition, there were 1.6 million unauthorized individuals aged 18 to 24, and 3.7 million unauthorized individuals aged 25 to 34.[6] These data represent totals and include all individuals in the specified age groups regardless of length of presence in the United States, age at time of initial entry into the United States, or educational status. Numerical estimates of potential beneficiaries of the policy set forth in DHS's June 15, 2012 memorandum are provided below.

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[4] This provision, section 505, nominally bars states from conferring postsecondary education benefits (e.g., in-state tuition) to unauthorized aliens residing within their jurisdictions if similar benefits are not conferred to out-of-state U.S. citizens. Nevertheless, about a dozen states effectively do grant in-state tuition to resident unauthorized aliens without granting similar benefits to out-of-state citizens, and courts that have considered these provisions have upheld them.

[5] For additional information, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

[6] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker.

Legislation

Multiple bills have been introduced in recent Congresses to provide relief to unauthorized alien students. These bills have often been entitled the Development, Relief, and Education for Alien Minors Act, or the DREAM Act. A common element in these bills is that they would enable certain unauthorized alien students to obtain legal status through an immigration procedure known as *cancellation of removal*[7] and at some point in the process, to obtain legal permanent resident (LPR) status, provided they meet all the applicable requirements. Multiple DREAM Act bills have been introduced in the 112th Congress but none have seen any legislative action.[8]

Traditional DREAM Act bills

Since the 109th Congress, "standard" DREAM Act bills have included language to repeal the 1996 provision mentioned above and to enable certain unauthorized alien students to adjust status (that is, to obtain LPR status in the United States). These bills have proposed to grant LPR status on a conditional basis to an alien who, among other requirements, could demonstrate that he or she:

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[7] Cancellation of removal is a discretionary form of relief that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien's status is adjusted to that of a legal permanent resident.

[8] For additional analysis of DREAM Act legislation, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*.

- was continuously physically present in the United States for at least five years preceding the date of enactment;
- was age 15 or younger at the time of initial entry;
- had been a person of good moral character since the time of initial entry;
- was at or below a specified age (age has varied by bill) on the date of enactment; and
- had been admitted to an institution of higher education in the United States or had earned a high school diploma or the equivalent in the United States.

The bills also include special requirements concerning inadmissibility,[9] and some would disqualify any alien convicted of certain state or federal crimes. After six years in conditional LPR status, an alien could have the condition on his or her status removed and become a full-fledged LPR if he or she meets additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the uniformed services[10] for at

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[9] The Immigration and Nationality Act (INA) enumerates classes of inadmissible aliens. Under the INA, except as otherwise provided, aliens who are inadmissible under specified grounds, such as health-related grounds or criminal grounds, are ineligible to receive visas from the Department of State or to be admitted to the United States by the Department of Homeland Security.

[10] As defined in Section 101(a) of Title 10 of the U.S. Code, *uniformed services* means the Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard); the commissioned corps of the

least two years. Two similar bills with these elements (S. 952, H.R. 1842)—both entitled the DREAM Act of 2011—have been introduced in the 112th Congress.

Other Versions of the DREAM Act

Revised versions of the DREAM Act have also been introduced in Congress in recent years. In the 111th Congress, the House approved one of these DREAM Act measures as part of an unrelated bill, the Removal Clarification Act of 2010 (H.R. 5281).[11] Unlike earlier DREAM Act bills, this measure[12] did not include a repeal of the 1996 provision and proposed to grant eligible individuals an interim legal status prior to enabling them to adjust to LPR status. Under this measure, an alien meeting an initial set of requirements like those included in traditional DREAM Act bills (enumerated in the previous section) would have been granted conditional *nonimmigrant*[13] status for five years. This status could have been extended for another five years if the alien met additional requirements, including completing at least two years in a bachelor's or higher degree program in the United States or serving in the Armed Forces for at least two years. The applications to obtain conditional status initially and to extend this status would have been subject to surcharges. At the

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National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service.

[11] The Senate failed, on a 55-41 vote, to invoke cloture on a motion to agree to the House-passed DREAM Act amendment, and H.R. 5281 died at the end of the Congress.

[12] The language is the same as that in H.R. 6497 in the 111th Congress.

[13] Nonimmigrants are legal temporary residents of the United States.

end of the second conditional period, the conditional nonimmigrant could have applied to adjust to LPR status.

Two bills in the 112th Congress—the Adjusted Residency for Military Service Act, or ARMS Act (H.R. 3823) and the Studying Towards Adjusted Residency Status Act, or STARS Act (H.R. 5869)—follow the general outline of the House-approved measure described above, but include some different, more stringent requirements. These bills would provide separate pathways for unauthorized students to obtain LPR status through military service (ARMS Act) or higher education (STARS Act). Neither bill would repeal the 1996 provision and, thus, would not eliminate the statutory restriction on state provision of postsecondary educational benefits to unauthorized aliens.

The initial requirements for conditional nonimmigrant status under the ARMS Act are like those in the traditional DREAM Act bills discussed above. The STARS Act includes most of these requirements, as well as others that are not found in other DREAM Act bills introduced in the 112th Congress. Two new STARS Act requirements for initial conditional status are: (1) admission to an accredited four-year college, and (2) submission of the application for relief before age 19 or, in some cases, before age 21.

Under both the ARMS Act and the STARS Act, the conditional nonimmigrant status would be initially valid for five years and could be extended for an additional five years if applicants meet a set of requirements. In the case of the ARMS Act, these requirements would include service in the Armed Forces on active duty for at least two years or service in a reserve component of

the Armed Forces in active status for at least four years. In the case of the STARS Act, the requirements for an extension of status would include graduation from an accredited four-year institution of higher education in the United States. After obtaining an extension of status, an alien could apply to adjust to LPR status, as specified in each bill.

DHS Memorandum of June 15, 2012

On June 15, 2012, the Obama Administration announced that certain individuals who were brought to the United States as children and meet other criteria would be considered for relief from removal. Under the memorandum, issued by Secretary of Homeland Security Janet Napolitano, these individuals would be eligible for deferred action[14] for two years, subject to renewal, and could apply for employment authorization.[15] The eligibility criteria for deferred action under the June 15, 2012 memorandum are:

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[14] Deferred action is "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion." U.S. Department of Homeland Security, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities," http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-lowenforcement-priorities.shtm.

[15] U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

- under age 16 at time of entry into the United States;
- continuous residence in the United States for at least five years preceding the date of the memorandum;
- in school, graduated from high school or obtained general education development certificate, or honorably discharged from the Armed Forces;
- not convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and not otherwise a threat to national security or public safety; and
- age 30 or below.

These eligibility criteria are similar to those included in DREAM Act bills discussed above. The deferred action process set forth in the June 15, 2012 memorandum, however, would not grant eligible individuals a legal immigration status.[16]

Based on these eligibility criteria, the Pew Hispanic Center has estimated that the policy set forth in the June 15, 2012 memorandum could benefit up to 1.4 million unauthorized aliens in the United States. This potential beneficiary population total includes 0.7 mil-

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[16] The DHS memorandum states: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law." Ibid., p. 3.

lion individuals under age 18 and 0.7 million individuals aged 18 to 30.[17]

Antecedents of the Policy

The Attorney General and, more recently, the Secretary of Homeland Security have had prosecutorial discretion in exercising the power to remove foreign nationals. In 1959, a major textbook of immigration law stated, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."[18] Specific guidance on how prosecutorial discretion was applied in individual cases was elusive in the early years.[19] Generally, prosecutorial discretion

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[17] Pew Hispanic Center, "Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy," June 15, 2012, http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation policy/.

[18] Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

[19] For example, in 1961, an official with the former Immigration and Naturalization Service (INS) offered his insights on circumstances in which discretionary relief from removal might be provided. The first factor he cited was age: "I have always felt that young people should be treated in our proceedings as are juveniles in the Courts who have violated criminal law. . . My personal opinion is that certainly someone under eighteen is entitled to extra consideration." He added that persons over 60 or 65 years of age should be given special consideration. He also emphasized length of residence in the United States as a factor, noting that "five years is a significant mark in immigration law." Other factors he raised included good moral character, family ties in the United States, and exceptional and unusual hardship to the alien as well as family members. Aaron I. Maltin, Special Inquiry Officer, "Relief from Depor-

is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; deciding to detain an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to let the alien depart voluntarily; and executing a removal order. (The legal authority to exercise prosecutorial discretion is discussed separately below.)

Over the next few decades, an official guidance on discretionary relief from removal began to take shape. A 1985 Congressional Research Service "white paper" on discretionary relief from deportation described the policies of Immigration and Naturalization Service (INS)[20] at that time.

> Currently, three such discretionary procedures are relatively routinely used by INS to provide relief from deportation. One of the procedures—stay of deportation—is defined under INS regulations; another—deferred departure or deferred action—is described in INS operating instructions; and the

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tation," *Interpreter Releases*, vol. 38, no. 21 (June 9, 1961), pp. 150-155. He also discussed refugee and asylum cases.

[20] Most of the immigration-related functions of the former INS were transferred to the U.S. Department of Homeland Security when it was created in 2002 by the Homeland Security Act (P.L. 107-296). Three agencies in DHS have important immigration functions in which prosecutorial discretion may come into play: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).

> third—extended voluntary departure—has not been formally defined and appears to be evolving.

The CRS "white paper" further noted that the executive branch uses these three forms of prosecutorial discretion "to provide relief the Administration feels is appropriate but which would not be available under the statute."[21]

In an October 24, 2005, memorandum, William Howard, then-Principal Legal Advisor of DHS's Immigration and Customs Enforcement (ICE), cited several policy factors relevant to the need to exercise prosecutorial discretion. One factor he identified was institutional change. He wrote:

> "Gone are the days when INS district counsels . . . could simply walk down the hall to an INS district director, immigrant agent, adjudicator, or border patrol officer to obtain the client's permission to proceed . . . Now the NTA-issuing clients might be in different agencies, in different buildings, and in different cities from our own."

Another issue Howard raised was resources. He pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

> "Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court

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[21] Sharon Stephan, *Extended Voluntary Departure and Other Blanket Forms of Relief from Deportation*, Congressional Research Service, 85-599 EPW. February 23, 1985.

> cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000."[22]

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or someone for whom sympathetic humanitarian circumstances "cry for an exercise of prosecutorial discretion."[23]

In November 2007, then-DHS Assistant Secretary for ICE Julie L. Myers issued a memorandum in which she clarified that the replacement of the "catch and release" procedure with the "catch and return" policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not "diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health-related cases and caregiver issues."[24] Assistant Secretary Myers referenced and attached a November 7, 2000, memorandum entitled "Exercising Prosecutorial Discretion," which was written by former INS

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[22] William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all OPLA Chief Counsel, October 24, 2005.

[23] *Ibid.*

[24] Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion*, memorandum, November 7, 2007. CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel. (Hereafter CRS R42057, *Interior Immigration Enforcement.*)

Commissioner Doris Meissner. The 2000 memorandum stated, in part:

> "Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals."[25]

Meissner further stated that prosecutorial discretion should not become "an invitation to violate or ignore the law."[26]

The Meissner, Howard, and Myers memoranda provide historical context for the March 2011 memorandum on prosecutorial discretion written by ICE Director John Morton.[27] Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to

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[25] Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

[26] *Ibid.*

[27] John Morton, Director, Immigration and Customs Enforcement, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens*, memorandum, March 2, 2011.

civil immigration enforcement.[28] Under these guidelines, ICE's top three civil immigration enforcement priorities are to: (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,[29] and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.[30]

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[28] ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," http://www.ice.gov/about/overview/. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

[29] The memorandum does not define "recent illegal entrants." DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; and DHS policy is to pursue expedited removal proceedings against aliens who are determined to be inadmissible because they lack proper documents, are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, are encountered by an immigration officer within 100 miles of the U.S. border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States for over 14 days. See CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[30] CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum and William A. Kandel.

In a June 17, 2011 memorandum, Morton spells out 18 factors that are among those that should be considered in weighing prosecutorial discretion. The factors include those that might halt removal proceedings, such as whether the person's immediate relative is serving in the military, whether the person is a caretaker of a person with physical or mental disabilities, or whether the person has strong ties to the community. The factors Morton lists also include those that might prioritize a removal proceeding, such as whether the person has a criminal history, whether the person poses a national security or public safety risk, whether the person recently arrived in the United States, and how the person entered. At the same time, the memorandum states:

> "This list is not exhaustive and no one factor is determinative. ICE officers, agents and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."

The Morton memorandum would halt removal proceedings on those foreign nationals that are not prioritized for removal. The foreign nationals whose removals are halted in keeping with the Morton memorandum might be given deferred action or some other relief from removal.[31]

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[31] John Morton, Director of Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for Apprehension, Detention and Removal of Aliens*, memorandum to field office directors, special agents in charge, and chief counsels, June 17, 2011.

Deferred Action

In 1975, INS issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The INS Operating Instructions said that consideration should be given to advanced or tender age, lengthy presence in the United States, physical or mental conditions requiring care or treatment in the United States, and the effect of deportation on the family members in the United States. On the other hand, those INS Operating Instructions made clear that criminal, immoral or subversive conduct or affiliations should also be weighed in denying deferred action.[32] Today within DHS, all three of the immigration-related agencies—ICE, U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP)—possess authority to grant deferred action. A foreign national might be considered for deferred action at any stage of the administrative process.[33]

Because of where the foreign national may be in the process, ICE issuances of deferred action are more likely to be aliens who are detained or in removal proceedings. It is especially important to note, as mentioned above, that not all prosecutorial discretion decisions to halt removal proceedings result in a grant of deferred action to the foreign national. Voluntary

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[32] Shoba Sivaprasad Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal*, Spring 2010.

[33] Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, *Immigration Law and Procedure*. Newark: LexisNexis, vol. 6, §72.03.

departure, for example, might be an alternative outcome of prosecutorial discretion.[34]

Other Forms of Deferred Departure

In addition to deferred action, which is granted on a case-by-case basis, the Administration may use prosecutorial discretion, under certain conditions, to provide relief from deportation that is applied as blanket relief.[35] The statutory authority cited by the agency for these discretionary procedures is generally that portion of the INA that confers on the Attorney General the broad authority for general enforcement and the section of the law covering the authority for voluntary departure.[36]

The two most common uses of prosecutorial discretion to provide blanket relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure

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[34] Voluntary departure typically means that the alien concedes removability and departs the United States on his or her own recognizance, rather than with a final order of removal.

[35] In addition to relief offered through prosecutorial discretion, the INA provides for Temporary Protected Status (TPS). TPS may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[36] §240 of INA, 8 U.S.C. §1229a; §240B, 8 U.S.C. §1229c.

(EVD).[37] The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate. Foreign nationals who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.

The executive branch has provided blanket or categorical deferrals of deportation numerous times over the years. CRS has compiled a list of these administrative actions since 1976 in **Appendix A.**[38] As the table indicates, most of these discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters. In many of these instances, Congress was considering legislative remedies for the affected groups, but had not yet enacted immigration relief for them. The immigration status of those who benefited from these deferrals of deportation often—but not always—was resolved by legislation adjusting their status (**Appendix A**).

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[37] As TPS is spelled out in statute, it is not considered a use of prosecutorial discretion, but it does provide blanket relief from removal temporarily.

[38] **Appendix A** only includes those administrative actions that could be confirmed by copies of official government guidance or multiple published accounts. For example, reports of deferred action after Hurricane Katrina or the September 11, 2001, terrorist attacks could not be verified, though it seems likely that the Administration did provide some type of temporary reprieve.

Two Illustrative Examples

Several of the categorical deferrals of deportation that were **not** country-specific bear some similarities to the June 15, 2012 policy directive. Two examples listed in **Appendix A** are summarized below: the "Silva letterholders" class and the "family fairness" relatives. Both of these groups receiving discretionary relief from deportation were unique in their circumstances. While each group included many foreign nationals who would otherwise be eligible for LPR visas, they were supposed to wait in numerically-limited visa categories. These wait times totaled decades for many of them. Congress had considered but not enacted legislation addressing their situations. Ultimately, their cases were resolved by provisions folded into comprehensive immigration legislation.[39]

The "Silva letterholders" were foreign nationals from throughout the Western Hemisphere who were in the United States without legal authorization. In 1976, the Attorney General opined that the State Department had been incorrectly charging the visas for Cuban refugees against the Western Hemisphere numerical limits from 1966 to 1976. A class action case named for Mr. Refugio Silva was filed to recapture the 145,000 LPR visas given to Cubans for foreign nationals with approved petitions from other Western Hemisphere nations. Apparently many of the aliens involved in the case were already in the country, out-of-status, even though they had LPR petitions pending. In other

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[39] These policies and legal provisions pre-date the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (referenced above), which added substantial new penalties and bars for illegal presence in the United States.

words, they had jumped the line. In 1977, the Attorney General temporarily suspended the expulsion while the class action case moved forward. Class members were allowed to apply for work authorization. Meanwhile, Congress passed amendments to the INA in 1978 that put the Western Hemisphere nations under the per-country cap, which further complicated their situation, by making visa availability more difficult for some but not all of the Western Hemisphere countries. The courts ruled for the Silva class, but the 145,000 recaptured visas were inadequate to cover the estimated 250,000 people who had received letters staying their deportation and permitting them to work. When the dependents of the Silva letterholders were included, the estimated number grew to almost half a million. Most of those in the Silva class who did not get one of the recaptured visas were ultimately eligible to legalize through P.L. 99-603, the Immigration Reform and Control Act (IRCA) of 1986.

Another example are the unauthorized spouses and children of aliens who legalized through IRCA. As Congress was debating IRCA, it weighed and opted not to provide a legalization pathway for the immediate relatives of aliens who met the requirements of IRCA unless they too met those requirements. As IRCA's legalization programs were being implemented, the cases of unauthorized spouses and children who were not eligible to adjust with their family came to the fore. In 1987, Attorney General Edward Meese authorized the INS district directors to defer deportation proceedings where "compelling or humanitarian factors existed." Legislation addressing this population was introduced throughout the 1980s, but not enacted. In 1990, INS Commissioner Gene McNary issued a new

"Family Fairness" policy for family members of aliens legalized through IRCA, dropping the where "compelling or humanitarian factors existed" requirement. At the time, McNary stated that an estimated 1.5 million unauthorized aliens would benefit from the policy. The new policy also allowed the unauthorized spouses and children to apply for employment authorizations. Ultimately, the Immigration Act of 1990 (P.L. 101-649) provided relief from deportation and employment authorization to them so they could remain in the United States until a family-based immigration visa became available. P.L. 101-649 also provided additional visas for the family-based LPR preference category in which they were waiting.

Legal Authority Underlying the June 15, 2012 Memorandum

The Secretary of Homeland Security would appear to have the authority to grant both deferred action and work authorization, as contemplated by the June 15 memorandum, although the basis for such authority is different in the case of deferred action than in the case of work authorization. The determination as to whether to grant deferred action has traditionally been recognized as within the prosecutorial discretion of immigration officers[40] and, thus, has been considered an inherent power of the executive branch, to which the

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[40] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (characterizing a grant of deferred action as within the prosecutorial discretion of immigration officers); Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, Nov. 7, 2000, at 2 (listing "granting deferred action or staying a final order of removal" among the determinations in which immigration officers may exercise prosecutorial discretion).

Constitution entrusts decisions about whether to enforce particular cases.[41] While it could perhaps be argued that decisions to refrain from fully enforcing a law might, in some instances, run afoul of particular statutes that set substantive priorities for or otherwise circumscribe an agency's power to discriminate among the cases it will pursue, or run afoul of the President's constitutional obligation to "take care" that the law is faithfully executed, such claims may not lend themselves to judicial resolution.[42] In contrast, when it enacted the Immigration Reform and Control Act of 1986, Congress delegated to the Attorney General (currently, the Secretary of Homeland Security) the authority to grant work authorization to aliens who are unlawfully present.[43]

Authority to Exercise Prosecutorial Discretion

The established doctrine of "prosecutorial discretion" provides the federal government with "broad" latitude in determining when, whom, and whether to prosecute particular violations of federal law.[44] The decision to

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[41] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that the Attorney General and the United States Attorneys have wide latitude in enforcing federal criminal law because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'").

[42] *See infra* notes 66-85 and accompanying text.

[43] P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

[44] United States v. Goodwin, 457 U.S. 368, 380 (1982). *See also* Exercising Prosecutorial Discretion, *supra* note 40, at 2 (defining prosecutorial discretion as "the authority of an agency charged with enforcing a law to decide whether to enforce, or not enforce, the law against someone").

prosecute is one that lies "exclusively" with the prosecutor.[45] This doctrine, which is derived from the Constitution's requirement that the President "shall take Care that the Laws be faithfully executed,"[46] has traditionally been considered to be grounded in the constitutional separation of powers.[47] Indeed, both federal and state courts have ruled that the exercise of prosecutorial discretion is an executive function necessary to the proper administration of justice. Thus, prosecutorial discretion may be appropriately characterized as a constitutionally-based doctrine.

Prosecutorial Discretion Generally

In granting discretion to enforcement officials, courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors—such as the strength of evidence, deterrence value, and existing enforcement priorities—"not readily susceptible to the kind of analysis the courts are competent to undertake."[48] Moreover, the Executive Branch has asserted that "because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and

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[45] *See* United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the *Confiscation Cases*, 7 Wall. 454 (1869) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ")).

[46] U.S. Const. art. II, §3 ("[H]e shall take Care that the Laws be faithfully executed . . . ").

[47] *See, e.g., Armstrong*, 517 U.S. at 464.

[48] Wayte v. United States, 470 U.S. 598, 607 (1985).

prosecute actions to enforce the laws adopted by Congress."[49]

An agency decision to initiate an enforcement action in the *administrative* context "shares to some extent the characteristics of the decision of a prosecutor in the executive branch" to initiate a prosecution in the criminal context.[50] Thus, just as courts are hesitant to question a prosecutor's decisions with respect to whether to bring a criminal prosecution, so to are courts cautious in reviewing an agency's decision not to bring an enforcement action. In the seminal case of *Heckler v. Cheney*, the Supreme Court held that "an

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[49] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 114 (1984). This traditional conception, however, may have been qualified in some respects following the Supreme Court's decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an "independent counsel" under the Ethics in Government Act[49] In sustaining the validity of the statute's appointment and removal conditions, the Court suggested that although the independent counsel's prosecutorial powers—including the "no small amount of discretion and judgment [exercised by the counsel] in deciding how to carry out his or her duties under the Act"—were executive in that they had "typically" been performed by Executive Branch officials, the court did not consider such an exercise of prosecutorial power to be "so central to the functioning of the Executive Branch" as to require Presidential control over the independent counsel. 487 U.S. 654 (1988). While the ultimate reach of *Morrison* may be narrow in that the independent counsel was granted only limited jurisdiction and was still subject to the supervision of the Attorney General, it does appear that Congress may vest certain prosecutorial powers, including the exercise of prosecutorial discretion, in an executive branch official who is independent of traditional presidential controls.

[50] *Heckler v. Cheney*, 470 U.S. 821, 832 (1985).

agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[51] The Court noted that agency enforcement decisions, like prosecution decisions, involve a "complicated balancing" of agency interests and resources—a balancing that the agency is "better equipped" to evaluate than the courts.[52] The *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-enforcement decisions, holding that an "agency's decision not to take enforcement action should be presumed immune from judicial review."[53] That presumption however, may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"[54] as is discussed below.

Prosecutorial Discretion in the Immigration Context

In *Reno v. American-Arab Anti-Discrimination Committee*, a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"[55] which entails civil (rather

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[51] *Id.* at 831. Accordingly, such decisions are generally precluded from judicial review under the Administrative Procedure Act (APA). 5 U.S.C. §701 (establishing an exception to the APA's presumption of reviewability where "agency action is committed to agency discretion by law.").

[52] *Heckler*, 470 U.S. at 831.

[53] *Id.* at 832.

[54] *Id.* at 833.

[55] 525 U.S. 471, 490 (1999). *See also* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (noting that immigration is

than criminal) proceedings. While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,[56] the Court's language is broad and arguably can be construed to encompass decisions to favorably exercise such discretion. More recently, in its decision in *Arizona v. United States*, a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropri-

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a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program").

[56] Specifically, the Court noted that any delays in criminal proceedings caused by judicial review of exercises of prosecutorial discretion would "merely . . . postpone the criminal's receipt of his just desserts," while delays in removal proceedings would "permit and prolong a continuing violation of United States law," and could potentially permit the alien to acquire a basis for changing his or her status. *Reno*, 525 U.S. at 490. The Court further noted that immigration proceedings are unique in that they can implicate foreign policy objectives and foreign-intelligence techniques that are generally not implicated in criminal proceedings. *Id.* at 491. It also found that the interest in avoiding selective or otherwise improper prosecution in immigration proceedings, discussed below, is "less compelling" than in criminal proceedings because deportation is not a punishment and may be "necessary to bring to an end an ongoing violation of United States law." *Id.* (emphasis in original).

ate even where he has committed a removable offense or fails to meet the criteria for admission."[57] According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of . . . individual case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on . . . international relations."[58]

In addition to such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion afforded first to INS and, later, the immigration components of DHS. These decisions include:

- whether to parole an alien into the United States;[59]
- whether to commence removal proceedings and what charges to lodge against the respondent;[60]
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests in an immigration judge;[61]

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[57] No. 11-182, Opinion of the Court, slip op. at 4-5 (June 25, 2011). Justice Scalia's dissenting opinion, in contrast, specifically cited the June 15 memorandum when asserting that "there is no reason why the Federal Executive's need to allocate its scarce enforcement resources should disable Arizona from devoting its resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift." Opinion of Scalia, J., slip op., at 19 (June 25, 2011).

[58] No. 11-182, Opinion of the Court, slip op. at 4-5.

[59] *See, e.g.*, Matter of Artigas, 23 I. & N. Dec. 99 (2001).

[61] *See, e.g.*, Matter of G-N-C, 22 I. & N. Dec. 281 (1998).

- whether to grant deferred action or extended voluntary departure;[62]
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;[63] and
- whether to impose a fine for particular offenses.[64]

The recognition of immigration officers' prosecutorial discretion in granting deferred action is arguably particularly significant here, because the June 15 memorandum contemplates the grant of deferred action to aliens who meet certain criteria (e.g., came to the United States under the age of sixteen).

Limitations on the Exercise of Prosecutorial Discretion

While the executive branch's prosecutorial discretion is broad, it is not "unfettered,"[65] and has traditionally been exercised pursuant to individualized determinations. Thus, an argument could potentially be made that the permissible scope of prosecutorial or enforcement discretion is exceeded where an agency utilizes its discretion to adopt a broad policy of non-enforcement as to particular populations in an effort to prioritize goals and maximize limited resources. It would ap-

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[62] *See, e.g.*, Matter of Yauri, 25 I. & N. Dec. 103 (2009) (deferred action); Hotel & Rest. Employees Union Local 25 v. Smith, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988), *aff'g*, 563 F. Supp. 157 (D.D.C. 1983) (extended voluntary departure).

[63] *See, e.g.*, Matter of Avetisyan, 25 I. & N. Dec. 688 (2012); Matter of York, 22 I. & N. Dec. 660 (1999).

[64] *See, e.g.*, Matter of M/V Saru Meru, 20 I. & N. Dec. 592 (1992).

[65] United States v. Batchelder, 442 U.S. 114, 125 (1979).

pear, especially with respect to agency enforcement actions, that the invocation of prosecutorial discretion does not create an absolute shelter from judicial review, but rather is subject to both statutory and constitutional limitations.[66] As noted by the U.S. Court of Appeals for the District of Columbia Circuit: "the decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness."[67] While it is apparent, then, that the exercise of prosecutorial discretion is subject to certain restrictions, the precise boundaries beyond which the executive may not cross remain unclear. Moreover, even if existing statutory or constitutional restrictions were conceivably applicable to the June 15 memorandum, standing principles would likely prevent judicial resolution of any challenge to the memorandum on these grounds.[68]

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[66] Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) ("It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.")

[67] *Id.* at 679 (citing *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970)).

[68] In order to satisfy constitutional standing requirements, a prospective plaintiff must have suffered a personal and particularized injury that is "fairly traceable" to the defendant's conduct and is likely to be redressed by the relief requested from the court. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984). It is difficult to envision a potential plaintiff who has been adequately injured by the issuance of the June 15 memorandum such that the individual could satisfy the Court's standing requirements. Standing is a threshold justiciability requirement. Thus, unless a plaintiff can attain standing to challenge the DHS directive, it would not appear that a court would have the opportunity to evaluate the directive's validity.

Potential Statutory Limitations on the Exercise of Prosecutorial Discretion

With respect to statutory considerations, the presumption following the Supreme Court's decision in *Heckler v. Cheney* has been that agency decisions not to initiate an enforcement action are unreviewable. However, *Heckler* expressly held that this presumption against the reviewability of discretionary enforcement decisions can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[69] Consistent with *Heckler*, a court may be willing to review a broad agency non-enforcement policy where there is evidence that Congress intended to limit enforcement discretion by "setting substantive priorities, or by otherwise circumscribing the agency's power to discriminate among issues or cases it will pursue."[70] The Heckler opinion also suggested that scenarios in which an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" may be subject to a different standard of review.[71]

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[69] 470 U.S. 821, 833 (1985).

[70] *Id.*

[71] *Id.* at 833 n.4 ("Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under §701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'").

Reviewability of the policy underlying the June 15 memorandum might, however, be limited even under a broad reading of Heckler, in part, because the INA does not generally address deferred action,[72] much less provide guidelines for immigration officers to follow in exercising it. Some commentators have recently asserted that amendments made to Section 235 of the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removed immigration officers' discretion as to whether to bring removal proceedings against aliens who unlawfully entered the United States.[73] Specifically, this argument holds that, pursuant to Section 235, as amended:

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[72] The INA uses the phrase "deferred action" only three times, in very specific contexts, none of which correspond to the proposed grant of deferred action contemplated by the June 15 memorandum. *See* 8 U.S.C. §1151 note (addressing the extension of posthumous benefits to certain surviving spouses, children, and parents); 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("Any [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."); 8 U.S.C. §1227(d)(2) (providing that the denial of a request for an administrative stay of removal does not preclude the alien from applying for deferred action, among other things). However, INS and, later, DHS policies have long addressed the use of deferred action in other contexts on humanitarian grounds and as a means of prioritizing cases. *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 821 (2004) (discussing a 1970's INA Operations Instruction on deferred action). This Instruction was rescinded in 1997, but the policy remained in place. *See, e.g.*, Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 6-72 IMMIGR. L. & PROC. §72.03 (2012).

[73] *See, e.g.*, Kris W. Kobach, *The "DREAM" Order Isn't Legal*, NEW YORK POST, June 21, 2012, http://www.nypost.com/p/news/

1) any alien present in the United States who has not been admitted (i.e., aliens who entered unlawfully) "shall be deemed . . . an applicant for admission;"

2) all aliens who are applicants for or otherwise seeking admission "shall be inspected by immigration officers;" and

3) in the case of an alien who is an applicant for admission, if the examining immigration officer determines that the alien is not clearly and beyond a doubt entitled to be admitted, the alien "shall be detained" for removal proceedings.[74]

It appears, however, that this argument may have been effectively foreclosed by the majority opinion in *Arizona*, where the Supreme Court expressly noted the "broad discretion exercised by immigration officials" in the removal process.[75] Moreover, the argument apparently relies upon a construction of the word "shall" that has generally been rejected in the context of prosecutions and immigration enforcement actions.[76] Rather than viewing "shall" as indicating mandatory agency actions, courts and the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration

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opinion/opedcolumnists/the_dream_order_isn_legal_4WAYaqJuea EK6MS0onMJCO.

[74] Arizona v. United States, No. 11-182, *Amicus Curiae* Brief of Secure States Initiative in Support of Petitioners, at 8-9 (quoting 8 U.S.C. §1225(a)(1), (a)(3), and (b)(2)(A)).

[75] No. 11-182, Opinion of the Court, slip op. at 4-5.

[76] *Cf.* Exercising Prosecutorial Discretion, *supra* note 40, at 3 ("[A] statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion.").

law in removal cases, have instead generally found that prosecutors and enforcement officers retain discretion to take particular actions even when a statute uses "shall" or "must" when discussing these actions.[77]

It is also unclear that the actions contemplated by the June 15 memorandum conflict with any substantive priorities set by Congress, or are "so extreme as to amount to an abdication" of DHS's responsibilities under the INA. For example, it appears that an argument could potentially be made to the contrary that the policy comports with the increased emphasis that Congress has placed upon the removal of "criminal aliens" with amendments made to the INA by IRCA, IIRIRA, and other statutes.[78] The June 15 memorandum expressly excludes from eligibility for deferred action

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[77] *See, e.g.*, Matter of E-R-M & L-R-M, 25 I. & N. Dec. 520, 523 (2011) (finding that determinations as to whether to pursue expedited removal proceedings (as opposed to removal proceedings under Section 240 of the INA) are within ICE's discretion, even though the INA uses "shall" in describing who is subject to expedited removal). The Board here specifically noted that, "in the Federal criminal code, Congress has defined most crimes by providing that whoever engages in certain conduct 'shall' be imprisoned or otherwise punished. But this has never been construed to require a Federal prosecutor to bring charges against every person believed to have violated the statute." *Id.* at 522.

[78] *See, e.g.*, IRCA, P.L. 99-603, §701, 100 Stat. 3445 (codified, as amended, at 8 U.S.C. §1229(d)(1)) (making the deportation of aliens who have been convicted of certain crimes an enforcement priority by requiring immigration officers to "begin any deportation proceeding as expeditiously as possible after the date of . . . conviction"); IIRIRA, P.L. 104-208, div. C, 110 Stat. 3009-546 to 3009-724 (expanding the definition of "aggravated felony," convictions for which can constitute grounds for removal, and creating additional criminal grounds for removal).

persons who have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors,[79] thereby potentially allowing immigration officers to focus their enforcement activities upon the "criminal aliens" who were identified as higher priorities for removal in earlier Obama Administration guidance on prosecutorial discretion.[80] In addition, Congress has funded immigration enforcement activities at a level that immigration officials have indicated is insufficient for the removal of all persons who are present in the United States without authorization. This level of funding figures prominently in the Obama Administration's rationale for designating certain aliens as lower priorities for removal,[81] and could potentially be said to counter any assertion that the Obama Administration's policy amounts to an "abdication" of its statutory responsibilities.

Potential Constitutional Limitations on the Exercise of Prosecutorial Discretion

With respect to constitutional considerations, it is clear that executive branch officials may not exercise prose-

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[79] Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretionindividuals-who-came-to-us-as-children.pdf.

[80] *See, e.g.*, John Morton, Director, U.S. ICE, Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, at 1-2, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[81] *Id.*, at 1 (estimating that ICE has resources to remove annually less than four percent of the noncitizens who are in the United States without authorization).

cutorial discretion in a manner that is inconsistent with established constitutional protections or other constitutional provisions. Selective prosecution cases commonly illustrate such an abuse of prosecutorial discretion. These cases typically arise where certain enforcement determinations, such as whether to prosecute a specific individual, are made based upon impermissible factors, such as race or religion.[82] A separate constitutional argument may be forwarded, however, in situations where the executive branch has, in effect, broadly refused to enforce a duly enacted statute by implementing a blanket ban on enforcement such that the agency has "expressly adopted a general policy which is in effect an abdication of its statutory duty."[83] By refusing to fully enforce certain aspects of a statutory provision, such an action may exceed the permissible scope of prosecutorial discretion and violate the President's duty that the "laws be faithfully executed."[84] However, CRS was unable to find a single case in which a court invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care clause. Moreover, it is unclear whether the June 15 memorandum would constitute an absolute non-enforcement policy so as to amount to an "abdication" of a statutory obligation, as discussed previously.

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[82] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding that a decision may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). *But see Reno*, 525 U.S. at 488 ("[A]s a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.").

[83] *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

[84] U.S. Const. art. II, §3.

Though establishing a department-wide policy regarding a group of individuals who meet certain criteria, the directive suggests that the listed criteria should be "considered" in each individual case. Thus, the directive could be interpreted as setting forth criteria for consideration in each individual exercise of prosecutorial discretion, rather than implementing a ban on deportation actions for qualified individuals.[85]

Authority to Grant Work Authorization

The INA grants the Secretary of Homeland Security arguably wide latitude to issue work authorization, including to aliens who are unlawfully present. Since the enactment of IRCA in 1986, federal law has generally prohibited the hiring or employment of "unauthorized aliens."[86] However, the definition of "unauthorized alien" established by IRCA effectively authorizes the Secretary to grant work authorization to aliens who are unlawfully present by defining an "unauthorized alien" as one who:

> with respect to the employment of an alien at a particular time, . . . is not either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General [currently, Secretary of Homeland Security].[87]

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[85] As is discussed elsewhere in this memorandum, there have been other instances where deferred action or extended voluntary departure was granted to individuals who were part of a more broadly defined group (e.g., persons from Nicaragua, surviving spouses and children of deceased U.S. citizens, victims and witnesses of crimes).

[86] *See* 8 U.S.C. §§1324a-1324b.

[87] 8 U.S.C. §1324a(h)(3).

Regulations promulgated by INS and DHS further provide that aliens who have been granted deferred action and can establish an "economic necessity for employment" may apply for work authorization.[88]

When first promulgated in 1987,[89] these regulations were challenged through the administrative process on the grounds that they exceeded INS's statutory authority.[90] Specifically, the challengers asserted that the statutory language referring to aliens "authorized to be . . . employed by this chapter or by the Attorney General" did not give the Attorney General authority to grant work authorization "except to those aliens who have already been granted specific authorization by the Act."[91] Had this argument prevailed, the authority of INS and, later, DHS to grant work authorization to persons granted deferred action would have been in doubt, because the INA does not expressly authorize the grant of employment documents to such persons. However, INS rejected this argument on the grounds that the:

> only logical way to interpret this phrase is that Congress, being fully aware of the Attorney Gen-

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[88] 8 C.F.R. §274a.12(c)(14). Under these regulations, the "basic criteria" for establishing economic necessity are the federal poverty guidelines. See 8 C.F.R. §274a.12(e).

[89] *See* INS, Control of Employment of Aliens: Final Rule, 52 Fed. Reg. 16216 (May 1, 1987).

[90] INS, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46092 (Dec. 4, 1987) (denying a petition for rulemaking submitted by the Federation for American Immigration Reform, which sought the rescission of certain regulations pertaining to employment authorization for aliens in the United States).

[91] *Id.*

> eral's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.[92]

Subsequent case law has generally affirmed that immigration officials have broad discretion in determining whether to deny or revoke work authorizations to persons granted deferred action, or in other circumstances.[93] These cases would appear to suggest that, by extension, immigration officials have similarly broad discretion to grant work authorization provided any requisite regulatory criteria (e.g., economic necessity) are met.

Corollary Policy Implications: Access to Federal Benefits

Many observers characterize foreign nationals with relief from removal who obtain temporary work authori-

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[92] *Id.*

[93] *See, e.g.*, Perales v. Casillas, 903 F.2d 1043, 1045 (5th Cir. 1990) ("[T]he agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law."); Chan v. Lothridge, No. 94-16936, 1996 U.S. App. LEXIS 8491 (9th Cir. 1996) (finding that INS did not abuse its discretion in denying interim work authorization to the petitioner while his application for asylum was pending); Kaddoura v. Gonzales, No. C06-1402RSL, 2007 U.S. Dist. LEXIS 37211 (W.D. Wash. 2007) (finding that the court lacked jurisdiction to hear a suit seeking to compel U.S. Citizenship and Immigration Services to grant work authorization because such actions are discretionary acts).

zations as "quasi-legal" unauthorized migrants.[94] They may be considered "lawfully present" for some very narrow purposes under the INA (such as whether the time in deferred status counts as illegal presence under the grounds of inadmissibility) but are otherwise unlawfully present. Foreign nationals to whom the government has issued temporary employment authorization documents (EADs) may legally obtain social security numbers (SSNs).[95] Possession of a valid EAD or SSN issued for temporary employment, however, does not trigger eligibility for federal programs and services. In other words, foreign nationals who are granted deferred action may be able to work but are not entitled to federally-funded public assistance, except for specified emergency services.[96]

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the

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[94] The "quasi-legal" unauthorized aliens fall in several categories. The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS). They have sought asylum in the United States and their cases have been pending for at least 180 days. They are immediate family or fiancées of LPRs who are waiting in the United States for their legal permanent residency cases to be processed. Or, they have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs. These are circumstances in which DHS issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States.

[95] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[96] CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

eligibility of all noncitizens for means-tested public assistance, with exceptions for LPRs with a substantial U.S. work history or military connection. Regarding unauthorized aliens, Section 401 of PRWORA barred them from any federal public benefit except the emergency services and programs expressly listed in Section 401(b) of PRWORA. This overarching bar to unauthorized aliens hinges on how broadly the phrase "federal public benefit" is implemented. The law defines this phrase to be

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[97]

So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation.

Thus, beneficiaries of the June 15, 2012 policy directive will be among those "quasi-legal" unauthorized migrants who have EADs and SSNs—but who are not otherwise authorized to reside in the United States.

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[97] § 401(c) of PRWORA, 8 U.S.C. § 1611.

Appendix. Past Administrative Directives on Blanket or Categorical Deferrals of Deportation

Selected Major Directives, 1976-2011

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1976	Extended voluntary departure (EVD) for Lebanese on a case-by-case basis	Otherwise deportable Lebanese in the United States.	NA	Lebanese received TPS from 1991 to 1993.
1977	EVD for Ethiopians	Otherwise deportable Ethiopians in the United States	NA	P.L. 100-204 contained a special extension of the legalization program established by the Immigration Reform and Control Act (IRCA) of 1986 to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ethiopians.
1977	The Attorney General temporarily suspended the expulsion of certain natives of Western Hemisphere countries, known as the "Silva Letterholders." They were granted stays and permitted to apply for employment authorization	A group of aliens with approved petitions filed a class action lawsuit to recapture about 145,000 visas assigned to Cubans.	230,000	Many of these cases were not resolved until the passage of IRCA.
1978	EVD for Ugandans	Otherwise deportable Ugandans in the United States	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Ugandans.
1979	EVD for Nicaraguans	Otherwise deportable Nicaraguans in the United States.	NA	EVD ended in September 1980
1979	EVD for Iranians	Otherwise deportable Iranians in the United States	NA	EVD ended in December 1979, and they were encouraged to apply for asylum

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1990	EVD for Afghans	Otherwise deportable Afghans in the United States	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Afghans.
1984	EVD for Poles	Otherwise deportable Poles in the United States	NA	P.L. 100-204 contained a special extension of the legalization program established by IRCA to include otherwise eligible aliens who had been granted EVD status during a time period that included the Poles.
1987	Memorandum from Attorney General Edwin Meese directing the Immigration and Naturalization Service (INS) not to deport any Nicaraguans and to grant them work authorizations	Nicaraguans who demonstrated a "well-founded fear of persecution," who had been denied asylum, or had been denied withholding of deportation	150,000 to 200,000	Legislation to grant stays of deportation to Nicaraguans as well as Salvadorans had received action by committees in both chambers during the 1980s. Congress ultimately enacted legislation legalizing the Nicaraguans, the Nicaraguan Adjustment and Central American Relief Act (P.L. 105-100)
1987	Attorney General Edwin Meese authorized INS district directors to defer deportation proceedings of certain family members of aliens legalized through IRCA	This policy directive applied where "compelling or humanitarian factors existed" in the cases of families that included spouses and children ineligible to legalize under IRCA.	NA	Legislation to enable the immediate family of aliens legalized through IRCA to also adjust status had been introduced. (See 1990 "Family Fairness" directive below.)
1989	Attorney General Richard Thornburgh instructed INS to defer the enforced departure of any Chinese national in the United States through June 6, 1990	Chinese nationals whose nonimmigrant visas expired during this time were to report to INS to benefit from this deferral and to apply, if they wished, for work authorizations.	80,000	Legislation that included provisions to establish Temporary Protected Status (TPS) was moving through Congress at that time.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1990	Executive Order 12711 of April 11, 1990 provided temporary protection for certain nationals of the People's Republic of China (PRC) and their dependents. It permitted temporary deferral of enforcement of the departure from the United States and conferred eligibility for certain other benefits through January 1, 1994	Chinese nationals and dependents who were in the U.S. on or after June 5, 1989, up to and including the date of Executive Order 12711	80,000	The Chinese Student Protection Act of 1992 (CSPA) (P.L. 102-404) enabled Chinese with deferred enforced departure to become lawful permanent residents.
1990	INS Commissioner Gene McNary issued a new "Family Fairness" policy for family members of aliens legalized through IRCA. The policy dropped the where "compelling or humanitarian factors existed" requirement and allowed the family members to apply for employment authorization.	Unauthorized spouses and children of aliens legalized under IRCA	1.5 million	P.L. 101-649 provided relief from deportation and employment authorization to an eligible alien who was the spouse or unmarried child of a legalized alien holding temporary or permanent residence pursuant to IRCA.
1991	Presidential directive to Attorney General instructing him to grant deferred enforced departure to Persian Gulf evacuees who were airlifted to the United States after the invasion of Kuwait in 1990	Aliens who had U.S. citizen relatives or who harbored U.S. citizens during the invasion, largely persons originally from Palestine, India, and the Philippines	2,227	It is not clear how these cases were handled.
1992	President George H.W. Bush instructed the Attorney General to grant deferred enforced departure (DED) to Salvadorans	Unauthorized Salvadorans who had fled the civil war in the 1980s	190,000	Congress had passed a law in 1990 giving Salvadorans TPS for 18 months.
1997	President William J. Clinton instructed the Attorney General to grant DED to Haitians for one year	Haitians who were paroled into the United States or who applied for asylum before December 1, 1995.	40,000	Haitians had been provided TPS from 1993-1997. Legislation enabling Haitians to adjust their status passed at the close of the 105th Congress (P.L. 105-277) in 1998.

Year	Type of Action	Class of Aliens Covered	Estimated Number	Commentary
1997	INS General Counsel Paul Virtue issues guidelines for deferred action for certain foreign nationals who might gain relief through the Violence Against Women Act.	Battered aliens with approved LPR self-petitions, and their derivative children listed on the self petition	NA	Regulations to implement the U visa portions of P.L. 106-386 were promulgated in 2007.
1998	Attorney General Janet Reno temporarily suspended the deportation of aliens from El Salvador, Guatemala, Honduras, and Nicaragua.	Unauthorized aliens from El Salvador, Guatemala, Honduras, and Nicaragua	NA	This relief was provided in response to Hurricane Mitch. Guatemalans and Salvadorans had their stays of removal extended until March 8, 1999. TPS was given to Hondurans and Nicaraguans.
1999	President William J. Clinton instructed the Attorney General to grant DED to Liberians for one year.	Liberian nationals with TPS who were living in the United States	10,000	Liberians had been provided TPS from 1991 through 1999, they were given TPS again in 2002.
2007	President George W. Bush directed that DED be provided to Liberians whose TPS expired.	Liberian nationals who had lived in the United States since October 1, 2002, and who had TPS on September 30, 2007.	3,600	
2011	President Barack Obama extended Liberian DED through March 2013.			

Source: CRS review of published accounts, archived CRS materials, and government policy documents.

Notes: Excludes aliens with criminal records or who pose a danger to national security. "*Estimated Number* refers to estimated number of beneficiaries at time of issuance of directive. *NA* means "not available." Other countries whose nationals had some form of deferred deportation prior to 1976 include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Panama, and Vietnam.

Memorandum [SEAL OMITTED]

C-1588-P

Subject	Date
Family Fairness: Guidelines For Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens	[Feb. 2, 1990]

To	From
Regional Commissioners Eastern Northern Southern Western	Office of the Commissioner

On November 13, 1987, the Service implemented guidelines on granting voluntary departure to the ineligible spouses and children of legalized aliens, the so-called "family fairness" policy.

The Service is likely to face the issue of family fairness for several more years, because of the length of time needed for newly legalized aliens to acquire lawful permanent resident status and then to wait for a visa preference number to become available for family members. Accordingly, the Service is clarifying its family fairness policy, to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens.

Effective February 14, 1990, the following policy is to be implemented by all district directors in determining

the eligibility for voluntary departure of ineligible spouses and children of legalized aliens.

1. Voluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien, who can establish that they have been residing in the United States since on or before November 6, 1986, if

   – the alien is admissible as an immigrant, except for documentary requirements;

   – the alien has not been convicted of a felony or three misdemeanors committed in the United States;

   – the alien has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group or political opinion.

2. Voluntary departure will be granted for a one-year period to aliens who meet these requirements. Cases will be reviewed on an annual basis thereafter by district directors to determine whether extensions of voluntary departure should be issued.

   – A grant of voluntary departure based on family fairness will be terminated if the legalized family member loses his or her status.

   – A grant of voluntary departure based on family fairness will be terminated if the alien fails to maintain the requirements outlined in Paragraph 1.

   – A grant of voluntary departure issued pursuant to this policy shall not be terminated for the sole

reasons that the legalized family member has become a lawful permanent resident.

3. Documentary evidence must be submitted to establish

   – the family relationship, through marriage certificates for spouses and birth or baptismal certificates for children and

   – residence with the legalized alien, through a sworn affidavit, under penalty of perjury, by the legalized alien.

4. Work authorization will be granted to aliens who qualify for voluntary departure under Paragraph One and as provided in Paragraph Two.

5. In the case of a child born after November 6, 1986, no deportation proceedings shall be instituted as long as a parent maintains his or her status as a legalized alien.

The Legalization and Special Agricultural Worker Programs will eventually bring permanent lawful immigration status to nearly 3 million aliens. It is critical that the Service continue to respond to the needs of these aliens and their immediate family members in a consistent and humanitarian manner.

/s/ GENE MCNARY
GENE MCNARY
Commissioner

Memorandum [SEAL OMITTED]

Subject	Date
Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues	[May 6, 1997]

To	From
Regional Directors District Directors Officers-in-Charge Service Center Directors	Office of Programs

This memorandum outlines changes in the handling of I-360 self-petitions for immigrant status filed by battered spouses and children of U.S. citizens and permanent residents aliens and addresses related issues. It should be read as a supplement to the guidance issued by the Office of Programs on April 16, 1996.

Background

The issue of domestic violence and its potential impact on spouses and children who would normally be entitled to immigration benefits under the I-130 petitioning process was first addressed by Congress in the Violence Against Women Act ("VAWA") which was enacted as part of the Violent Crime Control Act of 1994 ("Crime Bill"). The VAWA contains provisions to limit the ability of an abusive U.S. citizen ("USC") or lawful permanent resident ("LPR") to utilize the spouse' or child's immigration status in order to perpetuate the abuse. The Service published an interim rule on March 26, 1996 (59 FR 13061-13079) establish-

ing the procedures for qualified abused spouses and children to self-petition for immigrant classification using the Form I-360. This rule was accompanied by extensive field instructions in the Office of Programs' memorandum of April 16, 1996.

In the autumn of 1996, Congress enacted various new provisions relating to battered aliens, in both the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or "the welfare law") and the illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA" or "the immigration bill"). None of these new provisions directly affect the legal standards applicable to adjudication of I-360 applications. The new provisions do, however, provide additional benefits and protections for battered aliens, and have created the need for INS to restructure how we handle this category of very sensitive cases. This memorandum outlines those changes, and instructs field offices on the handling of pending cases and new cases received.

Centralization at the Vermont Service Center

On April 7, 1997, the Service published a notice in the Federal Register at 16607-08 establishing the Vermont Service Center as the direct mail filing location for all Forms I-360 filed by self-petitioning battered spouses and children (Attachment A). This centralization was necessitated by the new welfare provisions which make certain battered aliens—including self-petitioners and others—eligible for public benefits. In addition to adjudicating I-360 self-petitions, the Vermont Service Center will serve as a central "clearinghouse" for inquiries from federal, state and local

benefit-granting agencies regarding pending or recently-adjudicated cases, as discussed in more detail in the Verification section, below. Finally, as an alien may be eligible for public benefits not only upon the approval of the relevant immigrant status, but also upon having filed a petition which makes a prima facie case for such status, the Vermont Service Center will also begin making prima facie determinations pursuant to an interim rule expected to be published in the Federal Register prior to June 1, 1997.

While these are sensitive cases which require special handling, the move to centralized filing is expected to have only minimal impact on caseloads in the district offices. Since the beginning of the fiscal year, according to G-22 statistics, fewer than 500 cases have been filed Servicewide. Centralization allows the Service to have a small corps of officers well-versed in the complexity and sensitivity of VAWA adjudications, and will also allow for better monitoring of the caseload and any fraud trends.

Although the direct mail notice allows self-petitioners to continue to file locally until May 7, INS field offices and the other service centers are encouraged to forward to the Vermont Service Center those I-360s for which review/adjudication has not been initiated. All I-360 self-petitions received on or after May 7 shall be forwarded to the Vermont Service Center, but the 30 day transition period requires that no office refuse to receive an I-360 submitted before June 6, 1997. Immediate relatives, who were previously able to file concurrent I-360 self-petitions and I-485 adjustment applications, should be advised to retain their I-485s pending the Vermont Service Center's adjudica-

tion of the I-360 self-petition. The battered alien I-360s are to be mailed to:

INS Vermont Service Center
Attn: Family Services Product Line (VAWA)
75 Lower Weldon Street
St. Albans, VT 05479-0001

As inquiries from benefit-granting agencies can be expected in many cases, offices are encouraged to expedite handling of all pending cases which they do not forward to the Vermont Service Center. Nothing in this move to centralize direct mail filing changes the ability of the Vermont Service Center to transfer I-360s to district offices when an interview or investigation of suspected fraud is merited.

Deferred Action and Employment Authorization

In the April 16 memorandum, INS offices were encouraged to utilize voluntary departure and deferred action in order to provide approved VAWA self-petitioners with employment authorization pending the availability of a visa number. Since that time, in IIRIRA, Congress has limited grants of voluntary departure to no more than 120 days, and INS regulations no longer tallow for work authorization during any period of voluntary departure.

Starting June 1, when the Vermont Service Center approves a VAWA self-petition, it will then also assess, on a case-by-case basis, whether to place the alien in deferred action status pursuant to new deferred action guidelines in the Interim Enforcement Procedures (a forthcoming document which will be available on the 96Act bulletin board, as well as in printed versions).

By their nature, VAWA cases generally possess factors that warrant consideration for deferred action. In an unusual case, there may be factors present that would militate against deferred action; cases should therefore receive individual scrutiny. Although the Vermont Service Center is not required to obtain Regional Director approval for deferred action, it will report all grants of deferred action to the Eastern Regional Office for statistical and tracking purposes. In addition, a process for periodic review of the deferred action decisions made by the Vermont Service Center is planned.

If the alien is placed in deferred action, the Vermont Service Center will notify the alien that he or she may submit an I-765, Application for Employment Authorization. After the initial deferred action decision and issuance of a one-year employment authorization document, the Vermont Service Center will hold these files and review the deferred action decision upon each application for extension of work authorization. When the Vermont Service Center is notified by the National Visa Center or by an INS district office that the alien is seeking a visa abroad or has filed an adjustment application, the Vermont Service Center will forward the file to the appropriate office.

In cases where the I-360 was approved prior to April 1, many aliens may have current grants of voluntary departure. Upon expiration of voluntary departure, and for other cases adjudicated before June 1, district offices are strongly encouraged to utilize deferred action to provide work authorization pending the availability of a visa. As described in more detail below, battered aliens are now eligible for certain public benefits, which are often necessary for the victim to be able to

leave the abusive situation. To deny such aliens work authorization when they are able to obtain public assistance is counter to the spirit of welfare reform. Moreover, for many individuals, the ability to work is necessary in order to save the funds necessary to pay for the adjustment application and the penalty fee. As it has already been determined that these aliens face extreme hardship if returned to the home country and as removal of battered aliens is not an INS priority, the exercise of discretion to place these cases in deferred action status will almost always be appropriate.

Non-Disclosure Provisions and Other Limitations in IIRIRA § 384

Section 384 of IIRIRA strictly prohibits the release of any information relating to a VAWA self-petitioner, and also precludes any INS officer from making an adverse determination of admissibility or deportability based solely on information furnished by an abusive relative. Any violation of this section can subject an INS officer to disciplinary action and a fine of up to $5,000. This provision is discussed in more detail in IIRIRA Implementation Memo #96act.036 (Attachment B).

Verification of Status for Benefit-Granting Agencies

Section 501 of IIRIRA amends the welfare law to provide that certain battered aliens are "qualified aliens" for purposes of eligibility for some public benefits. This includes not only those aliens who can self-petition for immigrant status under the VAWA provisions, but also other aliens who have been abused by a member of their household. In cases other than VAWA self-petitioning cases, it is the benefit-granting agency not

the INS, which will assess the claims of abuse. Benefit providers, however, will request that INS verify the alien's status or the fact that a petition is pending on behalf of the alien. Detailed procedures for verification of these and other categories of qualified aliens under welfare law are being provided to benefit-granting agencies by the Department of Justice in a document entitled "Interim Guidance on Verification," which is expected to be published in the Federal Register later this month. An INS field directive designed for immigration status verifiers will be issued in conjunction with publication of the Interim Guidance on Verification.

Although some verification inquiries relating to battered aliens will be handled through the normal status verification channels, many of the inquiries will fall outside the type of inquiries which status verifiers typically handle. For example, because of the dynamics of abusive relationships, the abuse victim will not always have access to approval notices or other documentation relating to their cases. Moreover, because aliens can be eligible for public benefits upon filing a petition which makes a prima facie case for status, benefit providers will sometimes be seeking information on pending cases, including a determination as to whether the petition makes a prima facie case for eligibility for the status sought.

The Vermont Service Center will serve as the "clearinghouse" for these unusual types of inquiries, which will be submitted by fax using an inquiry format patterned on the sample at Attachment C. It is anticipated that the Vermont Service Center will be able to handle the vast majority of inquiries, which should

pertain to cases pending there or in one of the other service centers. For those inquiries which pertain to cases pending in district offices or sub-offices, the Vermont Service Center will forward the inquiries by fax to the attention of a designated Service Center liaison officer in each district or sub-office. Each district and sub-office should complete the liaison designation form at Attachment D and fax to Lisa Batey at 202/514-9262 prior to May 20 (the list of designees will be shared with INS regional offices and all four Service Centers). The designated liaison should ensure that a response is provided to the requesting agency, with a copy to the Vermont Service Center, within five working days. Information on pending or completed cases should not be given over the telephone, but rather should be sent via facsimile.

As you will note, the sample inquiry format includes a limited waiver of the non-disclosure provisions of IIRIRA § 384. At present, such a waiver is necessary before INS can provide any information relating to a VAWA self-petitioner, even to another governmental entity for purposes of determining eligibility for public benefits. Because of IIRIRA § 642, no waiver is necessary in other categories of cases, such as where the alien seeking benefits is the beneficiary of a spousal I-130 petition, but has suffered abuse at the hands of another household member. If there is any doubt as to whether a waiver is required, the officer should seek guidance from his or her district counsel. If there are waiver questions which cannot be resolved locally, please contact Lisa Batey of the Headquarters Office of Programs, at 202/514-9089.

Providing Information on Filing of I-360 Self-Petitions

Some battered aliens who are eligible to self-petition have chosen not to do so, instead relying upon the I-130 petition filed by their abuser. This not only allows the abuser to continue to control the spouse's or child's immigration status by withdrawing the petition, but also places a battered spouse at risk should the abuser subsequently obtain a divorce before the spouse is able to adjust status. For these and other reasons, such as easier determinations as to welfare eligibility and employment authorization, an immigration officer who deals with a battered alien should inform that alien about the process for self-petitioning, despite the fact that an I-130 petition is still pending on his or her behalf. The Interim Guidance on Verification similarly urges benefit agency caseworkers to give such aliens the number for the INS Forms Line [1-800-870-3676] and for the National Domestic Violence Hotline [1-800-799-7233] for assistance in preparing self-petitions.

Making Prima Facie Determinations

As noted above, Section 501 of IIRIRA includes in the definition of "qualified alien" for public benefit purposes those aliens who have filed a self-petition, or are the beneficiary of a spousal or parental petition, which sets forth a prima facie case for immigrant status under a variety of provisions. Specifically, those with approved petitions or pending petitions which make a prima facie case for status under any of the following Immigration and Nationality Act ("INA") provisions are included:

- spouse or child of a USC under 204(a)(1)(A)(i)
- spouse, child or unmarried son or daughter of an LPR under 204(a)(1)(B)(i)
- widow(er) of a USC under 204(a)(1)(A)(ii)
- self-petitioning battered spouse or child of a USC or LPR under 204(a)(1)(A)(iii)-(iv) or 204(a)(1)(B)(ii)-(iii)

In all but the latter category, battery or abuse will not be part of the INS adjudication, but rather will be assessed by the benefit-granting agency pursuant to the Interim Guidance on Verification.

In the case of self-petitioning battered spouses and children, the Vermont Service Center will begin making prima facie determinations no later than June 1, 1997, following publication of an interim rule in the Federal Register. If the self-petition and accompanying documentation are adequate, the self-petitioner will receive a decision or a Notice of Prima Facie Determination ("NPFD") within three weeks of filing. The approval notice or NPFD may be presented to benefit granting agencies as evidence of the applicant's status as a "qualified alien". The NPFD will be valid for 150 days, to allow time for the submission of any supplemental evidence and for adjudication of the self-petition.

In those cases which are not handled by the Vermont Service Center, benefit-granting agencies will be expecting decisions or prima facie determinations within a similar three-week time frame. As the non-VAWA cases are simpler adjudications based purely on family relationship, there are no plans to define what would

constitute a prima facie case. Instead, when a benefit-granting agency inquires about a pending case, INS offices should expedite the adjudication of the case in order to minimize the time during which the alien is unable to receive public assistance for which he or she may be eligible.

Aliens Seeking Issuance of Notices to Appear

An individual may also be eligible for public benefits if he or she makes a prima facie case for cancellation of removal as a battered spouse or child under INA § 240A(b)(2). INS district offices shall promptly issue a Notice to Appear to any alien who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal under section 240A(b)(2). District offices may want to do a search of the CLAIMS system to determine if a self-petition was filed and denied. It is important to note, however, that some individuals who are ineligible for status pursuant to the self-petitioning provisions will be eligible for cancellation (e.g., where the marriage has been terminated). Once proceedings have been initiated, the alien can contact the immigration court to seek a determination that he or she has demonstrated a prima facie case for cancellation of removal.

Other District Office Issues

While centralizing I-360 adjudications was motivated in part by the goal of having a small corps of officers well-trained in domestic violence issues, district adjudications officers will still interact with self-petitioners during the adjustment process. The nature of domestic violence and the sensitivity needed in dealing with victims are topics to which few INS officers will have

had exposure. District offices are strongly encouraged to identify two or more officers (depending upon the size of the district) to handle all adjustments following from I-360 approvals. The designated officers should have the experience, discretion and communications skills to be able to balance sensitivity in dealing with true victims with vigilance against fraud, and would ideally also serve as the designated Service Center liaison officer described at pages 4-5, above.

Recognizing the need for more training on complex and subtle domestic violence issues, Headquarters is looking into opportunities to provide informational materials and perhaps training sessions. In addition, a number of reputable non-profit organizations throughout the country provide training for personnel who work with domestic violence victims, and are willing to share their expertise with IN'S offices. Last year, for example, training for San Francisco adjudicators was provided by representatives of the Family Violence Prevention Fund. The training was well-received by district personnel, and was given at no cost to the district. Managers interested in obtaining materials or in fostering contacts with local organizations which work with victims of domestic violence should contact either of the persons named below for information about organizations active in their area.

* * * * *

The Office of Field Operations concurs with this memorandum. Addressees are strongly encouraged to distribute copies of this memorandum widely, particularly to adjudications and investigations officers. Questions about this policy or about the interim rule

published in the Federal Register may be directed to Lisa Batey, Headquarters Office of Programs, 202/514-9089, or Karen FitzGerald, Headquarters Benefits Division, at 202/305-4904.

/s/ [ILLEGIBLE]
for PAUL W. VIRTUE
Acting Executive
Associate Commissioner

[SEAL OMITTED]

U.S. Department of Justice
Immigration and
Naturalization Service

HQINV 50/1

425 I Street NW
Washington, DC 20536

[Aug. 30, 2001]

MEMORANDUM FOR: MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE
COMMISSIONER
OFFICE of FIELD
OPERATIONS

FROM: /s/ MICHAEL D. CRONIN
MICHAEL D. CRONIN
Acting Executive Associate
Commissioner
Office of Programs

SUBJECT: Victims of Trafficking and
Violence Protection Act of
2000 (VTVPA) Policy
Memorandum #2—"T" and
"U" Nonimmigrant Visas

The following instructions provide interim guidance to INS relating to the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Pub. L. No. 106-386, 114 Stat 1464, (October 28, 2000). This memorandum established interim procedures to be followed while the regulations implementing the T and U visa status are being promulgated by INS. The guidance in this memorandum is effective immediately, and will

remain in effect until regulations on T and U visa status are in place. This guidance supercedes or augments any previous national or local guidance on T and U visas.

BACKGROUND

The VTVPA reflects the United States Government's strong stance against trafficking and its intent to vigorously pursue the prosecution of traffickers and the protection of victims. It provides access to social services and benefits for some victims, creates stronger criminal penalties and enhanced sentencing for traffickers, and creates a new nonimmigrant classification for victims of severe forms of trafficking ("T Visa" or "T").[1] The VTVPA also reauthorizes and amends the Violence Against Women Act (VAWA) and adds a second new nonimmigrant classification for victims of other specific crimes ("U Visa" or "U").[2]

DEFINITIONS

Following are several definitions critical to the understanding of this guidance.

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[1] The statutory purposes of the Trafficking Victims Protection division of the VTVPA "are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." VTVPA §102(a)

[2] The "U Visa" related statutory purpose includes that intent "to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States . . " VTVPA § 1513(a)(2)(A)

Severe Forms of Trafficking in Persons as defined by VTVPA § 103(8). The term "severe forms of trafficking in persons" means—

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Certain Criminal Activity for "U Visa" Purposes as defined by VTVPA § 1513(b)(3) refers to one or more of the following or any similar activity in violation of Federal, State, or local criminal law; rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

Possible Victim is any alien who may be eligible for benefits under the "T" or "U" visa categories.

GENERAL GUIDANCE

The VTVPA creates two new nonimmigrant classifications. These two classifications provide an immigration mechanism for cooperating victims to remain tem-

porarily in the United States to assist in investigations and prosecutions and provide humanitarian protection to victims. The "T" classification is available to victims of severe forms of trafficking and their families and is limited to 5,000 principle aliens per year. The "U" classification is available to victims of certain criminal activity (see Definitions) and their families and is limited to 10,000 principals per year.

The "T" and "U" provisions of the VTVPA went into effect upon enactment, but regulations for implementation and for the processing of applications have not yet been finalized. In the interim, aliens who are identified as possible victims in the above categories **should not be removed from the United States until they have had the opportunity to avail themselves of the provisions of the VTVPA.** Existing authority and mechanisms such as parole, deferred action, and stays of removal will be used to achieve this objective, including continued presence for victims of severe forms of trafficking, as described in interim policy guidelines for continued presence and in the regulations implementing Section 107(c) of the VTVPA.

IDENTIFICATION OF POSSIBLE VICTIMS

In the absence of governing regulations, Service personnel should ensure broad interpretation of the guidance to ensure an alien is not removed from the United States if it appears that they fit into one of these victim categories. This guidance is an interim measure aimed only at identifying possible victims who may be eligible for relief under the new nonimmigrant classifications.

Service personnel may encounter possible victims in a variety of circumstances, such as at a Port of Entry (POE), between POEs, in detention, in adjudication processes, in Immigration Court, and/or in the course of investigative activities. At times, Service personnel will be the first point of contact with the possible victim; at other times contact may be established through a prosecutor's office, through a local or federal law enforcement agency, or thorugh an attorney. Regardless of the manner of encounter, if the individual is identified as a possible victim, Service personnel should take the necessary steps to ensure that the individual is not prematurely removed. Circumstances will vary from case to case, and INS personnel should keep in mind that it is better to err on the side of caution than to remove a possible victim to a country where he or she may be harmed by the trafficker or abuser, or by their associates.

Possible "T" Victims: The VTVPA specifies that four conditions must be satisfied to classify an alien as a principal "T" nonimmigrant.

1. The alien is or has been a victim of a severe form of trafficking in persons; and
2. The alien is physically present in the United States, American Samoa, or the Commonwealth of the Northern Marina Islands, or at a POE, on account of such trafficking; and
3. The alien has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking –or- the alien is under the age of 15; and

4. The alien would suffer extreme hardship involving unusual and severe harm upon removal.

Additionally, to avoid extreme hardship, the Attorney General may provide "T" nonimmigrant status to the spouses, children, and, in the case of those under age 21, the parents of "T" nonimmigrants.

Possible "U" Victims: The VTVPA specifies that four conditions must be satisfied to classify an alien as a principal "U" nonimmigrant:

1. The alien has suffered substantial physical or mental abuse as a result of having been a victim of the certain criminal activity (see Definitions); and

2. The alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning that certain criminal activity described in Definitions;

3. The alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official; to a Federal, State, or local prosecutor; to a Federal or State judge, to the Service; or to other Federal, State, or local authorities investigating or prosecuting one of the certain criminal activities described in Definitions; and

4. The criminal activity described violated the laws of the United States or occurred in the United States (including in Indian country and military

installations) or the territories and possessions of the United States.

Additionally, to avoid extreme hardship, the Attorney General may provide "U" nonimmigrant status to the spouses, children, and, in the case of a child under the age of 16, the parents of "U" nonimmigrants. This would require certification by a government official that an investigation or prosecution would be harmed without the assistance of the spouse, the child, or in the case of an alien child, the parent of the alien. It should be noted that trafficking victims might also be eligible for "U" nonimmigrant classification.

WORK AUTHORIZATION

Service personnel are instructed to use existing authority and mechanisms to prevent removal of possible "T" and "U" victims. These mechanisms include parole, deferred action, continuances, and stays of removal. Individuals who are identifies as possible "T" or "U" victims may be granted work authorization pursuant to existing authority and utilizing existing application procedures. For instance, potential applicants that are paroled may be granted work authorization pursuant to 8 C.F.R. § 274a.12(c)(11); potential applicants that are placed on deferred action may be granted work authorization pursuant to 8 C.F.R. § 274a.12(c)(14); and potential applicants that are granted a stay of removal may be granted work authorization in accordance with the provisions of 8 C.F.R. § 274a.12(c)(18). Governing regulations concerning continued presence for victims and other information related to this topic are also contained in the Department of Justice and Department of State interim rule published in the Federal Register on July 24, 2001

concerning the Protection and Assistance for Victims of Trafficking.

JUVENILES

Each District has a juvenile coordinator who should be contacted regarding juvenile victims.

RECORD KEEPING

It is imperative that documentation is maintained on possible victims. As such, information about the possible victim including all pertinent information surrounding the possible victim's circumstances must be maintained in the alien's A-file. If no A-file exists for the individual, one should be created. The use of standard sworn statements and/or applicable question and answer forms must be maintained for the record. As evidence of contact with the possible victim, the INS investigator and/or officer will include any necessary notes and memorandum for the record.

CONTINUED PRESENCE

Aliens who are victims of severe forms of trafficking and are potential witnesses may be eligible for a "T" nonimmigrant classification and shall be processed in accordance with the guidance contained in the policy memorandum dated August 20, 2001, entitled Interim Guidance #1—Continued Presence. Governing regulations concerning continued presence are also contained in the Department of Justice and Department of State interim rule published in the Federal Register on July 24, 2001 concerning the Protection and Assistance for Victims of Trafficking, as 28 CFR Part 1100.35.

LEGAL PROCEEDINGS

No alien identified as a possible victim eligible for "T" or "U" nonimmigrant classification should be removed

from the United States until they have had the opportunity to avail themselves of the provisions of the VTVPA. When a possible "T" or "U" victim is encountered during the course of proceedings, the District Counsel's office should contact the District Victim-Witness Coordinator so that appropriate action can be taken in accordance with the instructions in this memo. The District Counsel's office has the discretion to seek a continuance of the proceedings or to request administrative closure or termination.

FEDERAL OBLIGATIONS TO VICTIMS

Some of the provisions included in the VTVPA replicate INS responsibilities that are currently included in 42 U.S.C. 10606-10607 (the Victim's Rights and Restitution Act) and the *Attorney General Guidelines for Victim and Witness Assistance, 2000 edition*. This includes the referral of victims of Federal crime to medical care and assistance and the provision of reasonable protection. Victims who fall into the statutory definition of victim found in the *Attorney General Guidelines for Victim and Witness Assistance* must be afforded all the rights contained in that directive.[3] Service personnel should continue to involve the District and Sec-

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[3] For purposes of the Attorney General Guidelines for Victim and Witness Assistance, the term "victim" means a person that has suffered direct physical, emotional, or pecuniary harm as the result of a (federal) crime, including . . . in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, another person or persons as listed in 42 U.S.C. 10607. The Attorney General designated District Directors and Chief Patrol Agents of the office having primary responsibility for conducting a Federal investigation as the responsible officials to identify victims of Federal crime.

tor Victim-Witness coordinators in referring these victims for services.

This guidance is to be followed until such time as the alien's status has been confirmed, and, where the alien is an actual or possible material witness, the alien has had an opportunity to be considered for a "T" or a "U" nonimmigrant classification, as appropriate.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely to guide INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

[SEAL OMITTED]

U.S. Department of Justice
Immigration and
Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

Nov. 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT
COUNSEL

FROM: /s/ DORIS MEISSNER
DORIS MEISSNER
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the

particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately. However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the

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[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution,

U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest;

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chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial deci-

sions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion <u>is</u>, but also what it is <u>not</u>. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application

by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may

properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice

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[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel,

from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse,

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such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens

who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien—if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to

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[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that

decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.

- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.

- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.

- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien

entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.

- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.

- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.

- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United

States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.

- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary–for example, a time-limited as opposed to an indefinite bar to future admissibility–and these effects may be considered.

- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.

- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).

- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.

- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging

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[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based

upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identi-

fied.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

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[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts *not* to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary

departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to

later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority—such as this memorandum—from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

Meet the Press Transcript – Dec. 7, 2014

MEET THE PRESS—SUNDAY, DECEMBER 7, 2014

CHUCK TODD:

This Sunday, anger and disbelief across the country after a grand jury decides not to indict a police officer in a chokehold death.

HILLARY CLINTON:

Each of us has to grapple with some hard truths about race and justice in America.

CHUCK TODD:

Is the criminal justice system failing African Americans? Also, America in black and white. Our new poll on how differently African Americans and whites view the police. Plus, the fight within the Republican party over immigration.

JOHN BOEHNER:

We have limited options in terms of how we can deal with this.

CHUCK TODD:

How far will Republicans go to block President Obama's executive action?

TED CRUZ:

What I'm here urging my fellow Republicans to do is very, very simple. Do what you said you'd do.

CHUCK TODD:

And how rich is your member of Congress? A breakdown how Washington politicians are doing very well this last decade while ordinary Americans continue to tread water. I'm Chuck Todd and joining me to provide insight and analysis this morning are CNBC's Rick Santelli, Amy Walter of the Cook Political Report, John Stanton of BuzzFeed, and Kasim Reed, mayor of Atlanta. Welcome to Sunday. It's Meet the Press.

ANNOUNCER:

From NBC News in Washington, this is Meet the Press with Chuck Todd.

LINDSEY GRAHAM:

If we don't pass immigration reform, if we don't get it off the table in a reasonable, practical way, it doesn't matter who you run in 2016, we're in a demographic death spiral as a party.

LUKE RUSSERT:

For Meet the Press, Luke Russert.

(END TAPE)

CHUCK TODD:

Joining me now is the next governor of Texas and the current attorney general, Greg Abbott. Mr. Abbott, thanks for coming on Meet The Press.

GREG ABBOTT:

My honor. Great to be with you. Thanks.

CHUCK TODD:

All right. Let's start with the lawsuit. Standing requires you to show harm. Now, you argue the president's actions are going to inspire a fresh wave of illegal immigration. That that's the harm you're going to show. But we've seen other attempts at this before where courts have thrown out lawsuits like this because you can't quantify the harm. Are you gonna quantify the harm?

GREG ABBOTT:

First, this is growing much the same way that the lawsuit concerning Obamacare grew from 13 to 26 or 27 states. As to the standing issue, understand this. Texas has been at the epicenter of the 2012 DACA.

You all saw more than a 1,000 people crossing our board each and every day. Texas has come out of pocket to the tune of more than $100 million in law enforcement, education and healthcare because of what has happened. And understand this, the president's agencies' memos themselves have indicated that there will be more problems like this resulting from the next presidential order, or the most recent presidential order.

CHUCK TODD:

But many of those, and the children that came across in that wave, and I understand there's a lot of people that say that that wave was started, and some people believe it was inspired by, the DACA order on children that were brought here by parents illegally. But a lot of those folks were deported. Most of those folks were deported.

GREG ABBOTT:

Well, as we speak right now some of those children are in Texas schools. Some of the people who came here across the border are accessing—

CHUCK TODD:

But most of them—

(OVERTALK)

GREG ABBOTT:

—health—

CHUCK TODD:

—deported, right? Fair enough?

GREG ABBOTT:

I don't know the raw number.

CHUCK TODD:

Okay.

GREG ABBOTT:

All I do know is the absolute fact. And that is Texas has incurred taxpayer dollars out of pocket as a result of the prior executive order. It's also been stated by members of the Obama administration that this new executive order will lead to same results.

CHUCK TODD:

Now, when we talk about harm, I want to get into this financial issue here, because you talk about the issue of social services. How much money you have to spend to deal with these undocumented folks. But illegal immigrants that are working in Texas do participate in the

economy. There have been some estimates that if you deported everybody who was in Texas illegally it would actually be create an economic recession for the state of Texas. How do you separate those two facts?

GREG ABBOTT:

Sure. Because we're not suing for that economic harm. It's the way that Texas has been impacted that gives us standing. What we're suing for is actually the greater harm, and that is harm to the constitution by empowering the president of the United States to enact legislation on his own without going through Congress.

CHUCK TODD:

I want to play for you a clip that you've heard from a previous governor of Texas and what he has said about immigration. Here it is.

GEORGE W. BUSH (ON TAPE):

I want to remind people that family values do not stop at the Rio Grande River. People are coming to our country to do jobs that Americans won't do to be able to feed their families. And I think there's a humane way to recognize that and at the same time protect our borders and at the same way to make sure that we don't disadvantage those who have stood in line for years to become a legal citizen.

CHUCK TODD:

Do you agree with that statement?

GREG ABBOTT:

Well, in a way I understand this even more powerfully because my wife is going to be the first Hispanic first lady in the history of Texas. And Texas has had a long tradition

of uniting the Hispanic culture with Texas values. But remember this, there is a reason why people come from across the world to the United States and that is because of the power of what the Constitution has enabled this country to be.

It's the Constitution itself that is under assault by the president of the United States by this executive order. Chuck, what we are doing is this issue and this lawsuit is not about immigration. The issue in this lawsuit is about abuse of executive power. And if this abuse is not stopped it will erode the constitution that has attracted so many people to this country for generations.

CHUCK TODD:

Let me ask a basic question, though. Illegal immigration. Good for bad for the state of Texas? Bottom line.

GREG ABBOTT:

Legal immigration is great for the United States of America. Any illegal activity is not good anywhere.

CHUCK TODD:

And yet it's been good for the Texas economy. Right?

GREG ABBOTT:

Legal immigration has been great for America. And if bringing more immigrants here is the appropriate thing to do then what Congress needs to do and what the president needs to do is to figure out a way to improve our immigration system. In fact Americans are tired of both Congress and the president failing to act. It is time for Washington, D.C. to stop talking about this and take action. And that begins with securing our borders.

CHUCK TODD:

And let me ask you that on securing the border. Define that. Can you give me a metric that says, "Border's secure."

GREG ABBOTT:

Sure. I've been involved in these border surge operations where we see people crossing the border. Securing the border means ensuring that you don't have people who are crossing the border illegally. And that is through modern technology, through the technology that we are deploying right now, you can have monitors and cameras and see whether or not people are crossing the border. You want to see that grow to zero, would be the perfect metric. Congress has the power—

CHUCK TODD:

Is that realistic?

GREG ABBOTT:

Congress has the power and the resources to decide whether or not that metric will be zero or 10% or 20%.

CHUCK TODD:

Come 2016 you may be a popular figure inside the Republican party. Rick Perry, Ted Cruz, two Texas officials running for president. Rand Paul, born in Texas. Jeb Bush, his son is serving in Texas. Do you have a favorite?

GREG ABBOTT:

I will be strongly supportive of the Republican nominee—

CHUCK TODD:

Do you—

GREG ABBOTT:

—to be the next president of the United States.

CHUCK TODD:

You are staying out of the primarily totally?

GREG ABBOTT:

I'm staying out of the primary.

CHUCK TODD:

All right. Greg Abbott, we'll be watching you when you're governor of Texas. Thanks for coming on Meet The Press.

GREG ABBOTT:

Thank you, Chuck.

CHUCK TODD:

You got it.

Now the lawsuit guys, we're going to find out a lot about before the end of the year. Here's a map of the 20 states. Rick Santelli, governor of Texas also told me that he thinks they filed a preliminary, try to get a preliminary injunction as you would, if you believe there's harm done, then you immediately want the law not enacted until you get your day in court. How should Congressional Republicans be responding? We know how they're going to respond, but how should they be responding to this?

RICK SANTELLI:

Well, listen, it's a complicated issue. I come from immigrant grandparents. The country would not be what it is if it wasn't for the immigrants in this country. The border, it's important to some conservatives. I understand that. Outsource it to the likes of Google. You could work through this problem. Why do we need this—

(OVERTALK)

CHUCK TODD:

You'd do a technology thing, huh?

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

Current Statistics: Deferred Action for Childhood Arrivals: Pending, Receipts, Rejected, Approvals, and Denials

U.S. Citizenship & Immigration Services Deferred Action for Childhood Arrivals Receipts, Rejections, Approvals, and Denials from August 15, 2012 -December 19, 2014						
Type of Filing	**Total Filed**	**Rejections**	**Receipts**	**Pending**	**Approvals**	**Denials**
Initials	766,277	42,919	723,358	48,954	636,324	38,080
Renewals	230,050	11,658	218,392	86,893	131,445	54
Grand Total	996,327	54,577	941,750	135,847	767,769	38,134

Please note:

1) *The report reflects the most up-to-date data available at the time the report is generated.*

2) *The duplicates and rejected cases have been removed.*

Database Queried December 19, 2014

Report Created: December 19, 2014

System: CIS Consolidated Operational Repository (CISCOR)

By: Office of Performance and Quality (OPQ), Performance Analysis & External Re porting (PAER), DL

Parameter

Date: Pending, Receipts, Rejections, Approvals and Denials from 08/01/2012 to 12/19/2014

Form Type(s): I-821D

Data Type: Pending, Receipts, Rejections, Approvals and Denials

[SEAL OMITTED]

Statement of Jeh Charles Johnson, Secretary

U.S. Department of Homeland Security

Before the

United States Senate

Committee on Appropriations

July 10, 2014

Chairwoman Mikulski, Ranking Member Shelby, and Members of this Committee, thank you for the opportunity to testify today about the Department's efforts to address the recent rise of unaccompanied children and adults with children crossing the southwest border in the Rio Grande Valley in South Texas.

The recent and dramatic rise in illegal migration across our border, from Honduras, El Salvador and Guatemala, presents a major challenge to the United States. Particularly because so many of those crossing our border are children, there is also a humanitarian dimension to this problem, which the U.S. Government is bound and determined to respect. As Americans, we will adhere to domestic and international law, due process, and the basic principles of charity, decency, and fairness. But, in the final analysis, our border is not open to illegal migration.

Our message is clear to those who try to illegally cross our borders: you will be sent back home. We have already added resources to expedite the removal, without a hearing before an immigration judge, of adults who come from these three countries without children. We have worked with the governments of these countries to repatriate the adults quicker. (Indeed, while in Guatemala City two days ago, I personally witnessed a flight of repatriated adults returning home.) Within the last several months, we have dramatically reduced the removal time of many of these migrants. Within the law, we are sending this group back, and we are sending them back quicker.

Then there are adults who brought their children with them. Again, our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited

removal orders are effectuated. Last week we opened a detention facility in Artesia, New Mexico for this purpose, and we are building more detention space quickly. Adults who brought their children here expecting to make it to the nearest bus station in the U.S. were surprised that they were detained at Artesia. They will be sent back quickly, with the sad recognition that the large sum of money they paid a criminal smuggling organization to get them to the U.S will go to waste.

Then there are the unaccompanied children. As I have said many times, the long journey for a child, in the custody of a criminal smuggling organization, from Central America to the United States is dangerous. Many of the children are exploited, abused and hurt. Under our laws, an unaccompanied child from Central America must be transferred from the Department of Homeland Security (DHS) to the Department of Health and Human Services (HHS) and placed by HHS in a situation that is in the best interest of the child. But, the removal proceeding against the child continues. Every child will retain the right, like adults, to assert a claim of asylum or seek other protections. But, unless the child has been granted asylum or some other protection in this country—and the vast majority will not—he or she will be sent back and we seek additional resources to do that quickly.

Those who cross our border illegally must know there is no safe passage, and no free pass; within the confines of our laws, our values, and our resources, they will be sent back to their home countries.

I am grateful that the Senate Appropriations Committee included in its fiscal year 2015 DHS Appropriations Bill an additional $164.5 million to address this surge in unac-

companied children. However, given the current dramatic increase in apprehensions and activities associated with unaccompanied children and family groups, the resources necessary to appropriately address this issue are simply not available within the current fiscal year 2014 budget or the proposed fiscal year 2015 appropriation. To effectively address this emerging crisis, the President has requested emergency supplemental appropriations of $3.7 billion to comprehensively address this urgent humanitarian situation, including $1.5 billion for DHS to support more detention and removal facilities and enhanced processes as well as increased activities to disrupt and dismantle the human smuggling organizations that bring these individuals across U.S. borders.

Put plainly, without supplemental funding, in August U.S. Immigration and Customs Enforcement (ICE) will run out of money and DHS would need to divert significant funds from other critical programs just to maintain operations. Likewise, the Department of Health and Human Services (HHS) will be unable to address the influx of children by securing sufficient shelter capacity, leading to more children being held at short term border patrol processing stations for longer periods of time. Going forward, HHS will be unable to set-up more stable, cost-effective arrangements for these children, Border Patrol agents will have to be re-assigned from their border security work to assist at facilities housing children, and ICE will lack the resources needed to sufficiently maintain and expand detention and removal capacity for adults with children who cross the border illegally. Without additional funds, the Department of Justice (DOJ) will be unable to keep pace with its growing caseload, leading to longer wait times for those cases already on the docket. And absent dedicated

resources in Central American countries, we will not make progress on the larger drivers of this humanitarian situation. For this reason, supplemental resources are urgently needed to continue forward with the aggressive response that the Administration has deployed to date.

This emergency supplemental request is a direct result of the urgent situation in the Rio Grande Valley. In fiscal year 2013, CBP apprehended approximately 24,000 unaccompanied children at the border. By the end of June of this fiscal year, that number has already doubled to more than 57,000, and it continues to climb. We are preparing for a scenario in which the number of unaccompanied children apprehended at the border could reach up to 90,000 by the end of fiscal year 2014.

I know that additional money alone will not fully address the challenge we face, and we do not make this request lightly. While building capacity is necessary, we must also ramp up our ability to safely and quickly return the influx of these recent border crossers, which is exactly what we are doing.

As I have previously testified, we have established added capacity to deal with the processing and housing of the children and families and we are actively exploring additional options. To process the increased numbers of unaccompanied children and family groups in Texas, DHS has brought the children to our processing center at Nogales, Arizona before any unaccompanied children are sent to HHS, to whom DHS is mandated by law to transfer custody once they are identified as unaccompanied children. We are also arranging additional processing centers to handle the rise in the RGV, including adding a 1,000 bed processing center in McAllen.

Critically, DHS is also building additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose DHS has established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. The establishment of this temporary facility will help CBP process those encountered at the border and allow ICE to increase its capacity to house and expedite the removal of adults with children in a manner that complies with federal law. Artesia is one of several facilities that DHS will use to increase our capacity to hold and expedite the removal of the increasing number of adults with children illegally crossing the southwest border. DHS is ensuring that after apprehension, families are housed in facilities that adequately provide for their safety, security, and medical needs. Meanwhile, we will continue to expand use of the Alternatives to Detention program to ensure compliance with notices to appear before immigration judges for removal proceedings. DHS has also surged USCIS officers to hear credible fear claims and conduct the screening process. DOJ is temporarily reassigning immigration judges to handle the additional caseload. These immigration judges will adjudicate these cases as quickly as possible, consistent with all existing legal and procedural standards, including those for asylum applicants. Overall, this increased capacity and resources will allow ICE to return certain migrants from Central America to their home countries more quickly.

DHS has brought on more transportation assets to assist in the effort. The Coast Guard loaned air assets to help transport the children and families between CBP facilities.

ICE is now leasing charter aircraft to transport unaccompanied children to HHS custody.

Throughout the Rio Grande Valley Sector, we are conducting public health screening for all those who come into our facilities for any symptoms of contagious diseases or other possible public health concerns.

In order to effectuate the safe and timely return of these migrants, we are engaging with senior government officials of Guatemala, El Salvador, Honduras, and Mexico to address our shared border security interests, the underlying conditions in Central America that are promoting the exodus, and how we can work together to assure faster, secure removal and repatriation.

Just yesterday I returned from Guatemala. Joined by SOUTHCOM Commander General John Kelly and Ambassador Thomas A. Shannon, I met with President Otto Fernando Pérez Molina to discuss the urgent situation and to express our commitment to work with Guatemala to stem the flow of individuals, address the root causes of the influx, and to expand the capacity of these countries to receive and reintegrate repatriated migrants.

As a part of these international engagement efforts, the United States has committed foreign assistance resources to improve the capacity of these countries to receive and reintegrate returned individuals and address the underlying security and economic issues that cause migration. This funding will enable El Salvador, Guatemala, and Honduras to improve their existing repatriation processes and increase the capacity of these governments and nongovernmental organizations to provide expanded services to returned migrants. Additional resources will support community policing and law enforcement efforts to combat

gang violence and strengthen citizen security in some of the most violent communities in these countries.

DHS has also added personnel and resources to the investigation, prosecution, disruption, and dismantling of the smuggling organizations that are facilitating border crossings into the Rio Grande Valley. ICE Homeland Security Investigations (HSI) is deploying 60 additional criminal investigators and support personnel to their San Antonio and Houston offices for this purpose, as well as supplementing this with additional intelligence and programmatic support from ICE headquarters. ICE will continue to vigorously pursue and dismantle these human smuggling organizations by all investigative means to include the financial structure of these criminal organizations.

We have increased CBP staffing and detailed 115 additional experienced agents from less active sectors to augment operations there. On June 30, I announced the immediate deployment of 150 U.S. Border Patrol agents to the Rio Grande Valley Sector to augment illegal entry detection efforts while enhancing processing and detention capabilities.

Our plan of action is comprehensive and wide-reaching. However, the measures that we have taken—which have been critical and must be sustained—are and will continue to be costly. Many of these activities were not contemplated at the time Congress passed the fiscal year 2014 DHS appropriations act. With such a dramatic increase in the number of unaccompanied minors and family groups being apprehended, significant additional resources are needed. As a result, the President sent a letter to Congress on June 30, providing an update on the Administra-

tion's efforts to address this situation and requesting congressional action on emergency supplemental appropriations legislation to support the following:

- an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers;
- a sustained border security surge through enhanced domestic enforcement, including interdiction and prosecution of criminal networks;
- a significant increase in immigration judges, reassigning them to adjudicate cases of recent border crossers, and establishing corresponding facilities to expedite the processing of cases involving those who crossed the border in recent weeks;
- a stepped up effort to work with our Central American partners to repatriate and reintegrate migrants returned to their countries, address the root causes of migration, and communicate the realities of these dangerous journeys; and
- the resources necessary to appropriately detain, process, and care for children and adults.

Specifically, the President has requested your support on emergency supplemental appropriations legislation providing DHS with $1.5 billion for fiscal year 2014 and 2015 costs related to surge in unaccompanied children and families. Of this amount, $433 million is included for CBP and $1.104 billion is included for ICE.

Of the $433 million included for CBP, $329 million is for operational costs to include care, feeding, and transportation costs of unaccompanied children and family groups. In addition, this amount would provide $35 million for new

processing and detention facilities at Nogales and McAllen. Finally, the request supports CBP's efforts to detect and interdict unaccompanied children across U.S. borders, including $29 million for increased CBP support of the Border Security Task Forces, particularly along the Southwest Border, and $39 million for an additional 16,526 flight hours (above the level in the President's FY15 Budget request) and 16 additional crew members for CBP's Unmanned Aircraft Systems.

Of the $1.104 billion included for ICE, $995 million is for operational costs to include the detention, alternatives to detention, prosecution, and removal of family groups, as well as transportation costs of unaccompanied children to HHS custody. Another $109 million is included to support increased efforts to detect, disrupt and dismantle efforts to smuggle unaccompanied children and family groups across U.S. borders.

The requested amount would include $116 million for operational costs associated with the transportation of unaccompanied children to HHS custody, and $879 million for 6,350 additional family unit beds, 23,000 additional alternatives to detention participants per day, additional prosecution capacity, and related transportation and removal costs for family groups. Finally, the request strengthens ICE efforts to detect and disrupt efforts to smuggle unaccompanied children across U.S. borders, including $46 million for 179 additional members of the Border Security Task Forces, particularly along the Southwest Border, $38 million for additional domestic and international investigations and intelligence support, and $6 million for Operation Torrent Divide.

As the urgent situation presented by the influx of unaccompanied children and families in south Texas continues to evolve, we will look to use every available tool to ensure that we are addressing these challenges and changing circumstances, including the potential use of transfer authority if necessary and appropriate.

Finally, I want to once again thank Chairwoman Mikulski, Ranking Member Shelby, and Members of this Committee for this opportunity to testify and for the strong support that I have received from the Committee since becoming Secretary of the Department of Homeland Security. We are committed to continuing to work closely with the Committee and Congress on this critical issue, and to keep you informed. DHS is updating Members and staff on the situation in conference calls two times a week, facilitating site visits to Border Patrol facilities in Texas and Arizona for a number of Members and their staff, and providing daily updates to the Appropriations Committee on border apprehensions data.

In cooperation with the other agencies of our government that are dedicating resources to the effort, with the support of Congress, and in cooperation with the governments of Mexico and Central America, I believe we can stem this tide and address the broader issues. The requested supplemental funding is critical to enabling the Department to fulfill its mission and address the dramatic surge in unaccompanied children and families in a manner that maintains border security and reflects our laws and values.

Thank you for listening and I look forward to your questions.

[SEAL OMITTED]

Statement

by

Secretary Jeh C. Johnson

U.S. Department of Homeland Security

Hearing before the

House Committee on Homeland Security

Dec. 2, 2014

Thank you Chairman McCaul, Ranking Member Thompson, and Committee members for the opportunity to testify today.

On November 20 President Obama announced a series of executive actions to begin to fix our immigration system. The President views these actions as a first step toward reform of the system, and continues to count on Congress for the more comprehensive reform that only legislative changes can provide.

The actions we took will begin to fix the system in a number of respects.

To promote border security for the future, and to send a strong message that our borders are not open to illegal migration, we prioritize the removal of those apprehended at the border and those who came here illegally after January 1, 2014, regardless of where they are apprehended. We also announced the next steps to strengthen our border security efforts as a part of our Southern Border Campaign Strategy, which I first announced earlier this year.

To promote public safety, we make clear that those convicted of crimes, criminal street gang members, and national security threats are also priorities for removal.

To promote accountability, we encourage those undocumented immigrants who have been here for at least five years, have sons or daughters who are citizens or lawful permanent residents, and do not fall into one of our enforcement priorities, to come out of the shadows, get on the books, and pass national security and criminal background checks. After clearing all their background checks, these individuals are eligible for work authorization and will be able to pay taxes and contribute more fully

to our economy. The reality is that, given our limited resources, these people are not priorities for removal—it's time we acknowledge that and encourage them to be held accountable. This is simple common sense.

To rebuild trust with state and local law enforcement which are no longer honoring ICE detainers, we are ending the controversial Secure Communities program as we know it, and making a fresh start with a new program that fixes existing problems.

To promote U.S. citizenship, we will enable applicants to pay the $680 naturalization fee by credit card and expand citizenship public awareness.

To promote the U.S. economy, we will take administrative actions to better enable U.S. businesses to hire and retain qualified, highly skilled foreign born workers.

The reality is that, for decades, Presidents have used executive authority to enhance immigration policy. President Obama views these actions as a first step toward the reform of the system, and continues to count on Congress for the more comprehensive reform that only changes in law can provide.

I recommended to the President each of the Homeland Security reforms to the immigration system that he has decided to pursue. These recommendations were the result of extended and candid consultations I had with the leadership of Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). Along the way, I also spoke with members of the workforce who implement and enforce the law to hear their views. In my own view, any significant change in policy requires close consultation with those who administer the system. We

also consulted a wide range of stakeholders, including business and labor leaders, law enforcement officers, religious leaders, and members of Congress from both sides of the aisle. We also consulted with the Department of Justice, and we received a formal, written opinion from the Justice Department's Office of Legal Counsel concerning enforcement prioritization and deferred action, and that opinion has been made public.

Here is a summary of our executive actions:

Strengthening border security. Our executive actions emphasize that our border is not open to future illegal migration and that those who come here illegally will be sent back, unless they qualify for some form of humanitarian relief under our laws. The reality is that, over the last fifteen years spanning the Clinton, Bush, and Obama Administrations, much has been done to improve border security. But, through the executive actions announced last week, we can and will do more.

Today, we have unprecedented levels of border security resources—personnel, equipment and technology—along our Southwest border. This investment has produced significant positive results. Apprehensions have declined from over 1.6 million in 2000 to around 400,000 a year—the lowest rate since the 1970s. According to Pew Research, the number of undocumented immigrants in this country grew to a high of 12.2 million in 2007 and has remained, after a slight drop, at about 11.3 million ever since. That means this population has stopped growing for the first time since the 1980s, and over half of these individuals have been in the United States for 13 years.

Without a doubt, we had a setback this summer. We saw an unprecedented spike in illegal migration into South

Texas—from Guatemala, Honduras, and El Salvador. And as everyone knows, it consisted of large numbers of unaccompanied children and adults with children. We responded with more security and law enforcement resources; more processing centers; more detention space; more Border Patrol agents in the Rio Grande Valley; more prosecution of criminal smuggling organizations; an aggressive public message campaign; engagement of Central American leaders by the President and the Vice President; and increased interdiction efforts by the Government of Mexico. And, since the spring, the numbers of unaccompanied children crossing the southern border illegally have gone down considerably: May—10,578; June—10,620; July—5,499; August—3,138; September—2,426; October—2,529.

However, we are not finished with the work of securing our border. We can and will do more—that's a critical component of the President's executive actions.

We will build upon the border security infrastructure we put in place last summer. We announced several days ago the opening of another detention facility for adults with children in Dilley, Texas, that has the capability to detain over 2,000 individuals. At the same time, we will close the smaller, temporary facility for adults with children at Artesia, New Mexico. We are developing a "Southern Border Campaign Strategy" to fundamentally alter the way in which we marshal resources to the border under the direction of three new Department task forces. They will follow a focused risk-based strategy, with the overarching goals of enforcing our immigration laws and interdicting individuals seeking to illegally cross land, sea and air borders. These actions are designed to send a clear message: in the future, those who attempt to illegally cross our borders will be sent back.

Creating new and clearer enforcement prioritization policies. This new policy will also have a strong border security component to it, in addition to prioritizing for removal public safety and national security threats. Virtually every law enforcement agency engages in prosecutorial discretion. With the finite resources an agency has to enforce the law, it must prioritize use of those resources. To this end, DHS will implement a new and clearer enforcement and removal policy. The new policy places: (i) top priority on national security threats, convicted felons, criminal gang participants, and illegal entrants apprehended at the border; (ii) second-tier priority on those convicted of significant or multiple misdemeanors and those who entered or re-entered this country unlawfully after January 1, 2014,—regardless of whether they are apprehended at the border—or significantly abused the visa or visa waiver programs; and (iii) the lowest priority are those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014.

Giving people the opportunity to be held accountable. The reality is that, undocumented immigrants who have been in this country for years, raising American families and developing ties to the community. Many of these individuals have committed no crimes and are not enforcement priorities. It is time that we acknowledge this as a matter of official policy and encourage eligible individuals to come out of the shadows, submit to criminal and national security background checks, and be held accountable.

We will therefore offer, on a case-by-case basis, deferred action to individuals who (i) are not removal priorities under our new policy, (ii) have been in this country at

least 5 years, (iii) have sons or daughters who are U.S. citizens or lawful permanent residents, and (iv) present no other factors that would make a grant of deferred action inappropriate. The reality is that our finite resources will not and should not be expanded to remove these people. We are also amending eligibility for the Deferred Action for Childhood Arrivals (DACA) program. At present, eligibility is limited to those who were under 31 years of age on June 15, 2012, entered the United States before June 15, 2007, and were under 16 years old when they entered. We will amend eligibility for DACA to cover all undocumented immigrants who entered the United States before the age of 16, not limited to those born after June 15, 1981. We are also adjusting the cut-off date from June 15, 2007 to January 1, 2010 and expanding the period of work authorization from two years to three years.

President Obama's Administration is not the first to undertake such actions. In fact, the concept of deferred action is an established, long-standing administrative mechanism dating back decades, and it is one of a number of similar mechanisms Administrations have used to grant temporary immigration relief for humanitarian and other reasons. For example, Presidents Reagan and Bush authorized executive action to shield undocumented children and spouses who did not qualify for legalization under the Immigration Reform and Control Act of 1986. This "Family Fairness Program" used a form of relief known at the time as "indefinite voluntary departure," which is similar to the deferred action authority we use today.

Fixing Secure Communities. We will end the Secure Communities program as we know it. The overarching goal of the program is a good one, but it has attracted widespread criticism in its implementation and has been

embroiled in litigation. Accordingly, we will replace it with a new "Priority Enforcement Program" that closely and clearly reflects DHS's new top enforcement priorities. The program will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies but will, for the most part, limit the circumstances under which DHS will seek an individual in the custody of state and local law enforcement—specifically, only when an individual has been convicted of certain offenses listed in Priorities 1 and 2 of our new enforcement priorities outlined above.

Pay reform for ICE ERO officers. We will conduct an expeditious review of personnel reforms for Immigration and Customs Enforcement (ICE) officers engaged in removal operations, to bring their job classifications and pay coverage in line with other law enforcement personnel, and pursue regulations and legislation to address these issues.

Extending the provisional waiver program to promote family unity. The provisional waiver program we announced in January 2013 for undocumented spouses and children of U.S. citizens will be expanded—to include the spouses and children of lawful permanent residents, as well as the adult children of U.S. citizens and lawful permanent residents. At the same time, we will clarify the "extreme hardship" standard that must be met to obtain the provisional waiver.

Supporting military families. We will work with the Department of Defense to address the availability of parole-in-place and deferred action, on a case-by-case basis, for the spouses, parents, and children of U.S. citizens or lawful permanent residents who seek to enlist in the U.S. Armed Forces.

Increasing access to U.S. citizenship. We will undertake options to promote and increase access to naturalization and consider innovative ways to address barriers that may impede such access, including for those who lack resources to pay application fees. To enhance access to U.S. citizenship, we will (i) permit the use of credit cards as a payment option, and (ii) enhance public awareness around citizenship. USCIS will also include the feasibility of a partial fee waiver as part of its next biennial fee study.

Supporting U.S. business and high-skilled workers. Finally, DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain qualified, highly skilled foreign-born workers. For example, because our immigration system suffers from extremely long waits for green cards, we will amend current regulations and make other administrative changes to provide needed flexibility to workers with approved employment-based green card petitions.

Overall, the executive actions the President announced last week will not only bolster our border security, they will promote family unity, increase access to U.S. citizenship, grow and strengthen the competitiveness of the U.S. economy, and create jobs, particularly in the high-skilled labor sectors.

Again, the President views these actions as a first step toward the reform of our immigration system and he continues to count on Congress for the more comprehensive reform that only legislative changes can provide. In the meantime, we will use our executive authority to fix as much of our broken immigration system as possible.

I look forward to answering your questions.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF RICHARD ALLGEYER, Ph.D.

My name is Richard Allgeyer, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the Director of the Texas Health and Human Services Commission's Center for Strategic Decision Support (SDS). The Texas Health and Human Services Commission (HHSC) is the state agency responsible for ensuring the appropriate delivery of health and human services in Texas. As such, HHSC has operational responsibility for certain health and human services programs and oversight authority over the state health and human services agencies.

2. As a part of my employment with HHSC, I am responsible for analytic and quantitative research on health care utilization, demographic trends, and enrollment patterns for the state's health care and human service programs, including Medicaid. I am also re-

sponsible for program evaluation activities and analytic support across all of the HHS agencies and programs.

3. I have served in my current position since May 2001. Prior to that, I served as the manager for statistical reporting at the then Texas Department of Health.

4. In 2007, as part of the 2008-2009 General Appropriations Act, the Texas Legislature required HHSC to report the cost of services and benefits provided by HHSC to undocumented immigrants in the State of Texas. This report, also known as the Rider 59 Report, was first completed by HHSC in 2008. Due to numerous requests for more recent information following the issuance of the 2008 report, the Rider 59 Report was updated in 2010 and 2013. HHSC is currently preparing the 2014 update to the Rider 59 Report covering fiscal year (FY) 2013, but it has generated cost estimates for this time period.

5. Attached to this declaration are true and correct copies of the following documents:

- Exhibit 1: Report to the United States Congress on Services and Benefits Provided to Undocumented Immigrants, the original version of the Rider 59 Report prepared by HHSC in 2008.

- Exhibit 2: Report on Services and Benefits Provided to Undocumented Immigrants, the 2010 update of the Rider 59 Report.

- Exhibit 3: Report on Texas Health and Human Services Commission Services and

Benefits Provided to Undocumented Immigrants, the 2013 update of the Rider 59 Report.

6. Each of the records attached to this declaration is kept by HHSC in the course of its regularly conducted activity, and it was HHSC's regular practice for an employee or representative of HHSC, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion, or diagnosis.

7. HHSC provides three principal categories of services and benefits to undocumented immigrants in Texas: (i) Texas Emergency Medicaid; (ii) the Texas Family Violence Program (FVP); and (iii) Texas Children's Health Insurance Program (CHIP) Perinatal Coverage. Undocumented immigrants also receive uncompensated medical care from public hospitals in the State.

8. Emergency Medicaid is a federally required program jointly funded by the federal government and the states. The program provides Medicaid coverage, limited to emergency medical conditions including childbirth and labor, to undocumented immigrants living in the United States. Because HHSC Medicaid claims data do not conclusively identify an individual's residency status, the portion of Emergency Medicaid payments attributable to undocumented immigrants must be estimated. The total estimated cost to the State for the provision of Emergency Medicaid services to undocumented immigrants residing in Texas was ap-

proximately $80 million in FY 2007, $62 million in FY 2009, and $71 million in FY 2011; the current estimate for FY 2013 is $90 million.

9. The Family Violence Program contracts with non-profit agencies across the State to provide essential services to family violence victims, including undocumented immigrants, in three categories: shelter centers, non-residential centers, and Special Nonresidential Projects. Because the FVP does not ask individuals about their residency status, the portion of the FVP's expenditures attributable to undocumented immigrants must be estimated. The total estimated cost to the State for the provision of direct FVP services to undocumented immigrants residing in Texas was $1.2 million in FY 2007, $1.3 million in FY 2009, and $1.3 million in FY 2011; the current estimate for FY 2013 is $1.4 million.

10. Texas CHIP Perinatal Coverage provides prenatal care to certain low-income women who do not otherwise qualify for Medicaid. There is no way to definitively report the number of undocumented immigrants served by CHIP Perinatal Coverage because the program does not require citizenship documentation. CHIP Perinatal Coverage expenditures were not included in HHSC's original Rider 59 Report because a full year of program data was not available when the report was prepared. The total estimated cost to the State for CHIP Perinatal Coverage to undocumented immigrants residing in Texas was $33 million in FY 2009 and $35 million in FY 2011; the current estimate for FY 2013 is $38 million.

11. In the 2008 and 2010 versions of the Rider 59 Report, HHSC also provided estimates of the amount of uncompensated medical care provided by state public hospital district facilities to undocumented immigrants. In these reports, HHSC estimated that the State's public hospital district facilities incurred approximately $596.8 million in uncompensated care for undocumented immigrants in FY 2006 and $716.8 million in FY 2008. HHSC did not provide any estimates of uncompensated care for undocumented immigrants in the 2013 version of the Rider 59 Report, and HHSC has not compiled any such estimates for the updated report that HHSC is currently preparing.

12. Based on my knowledge, expertise, and research regarding the provision of services and benefits to undocumented immigrants by HHSC, I believe that the total costs to the State of providing such services and benefits to undocumented immigrants will continue to rise in the future to the extent that the number of undocumented immigrants residing in Texas increases.

13. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of Dec., 2014.

/s/ RICHARD ALLGEYER
RICHARD ALLGEYER, PH.D.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-16248

ARIZONA DREAM ACT COALITION, ET AL.,
PLAINTIFFS-APPELLANTS

v.

JANICE K. BREWER, ET AL., DEFENDANTS-APPELLEES

Sept. 2014

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ARIZONA

**UNITED STATES' BRIEF AS AMICUS CURIAE
IN OPPOSITION TO REHEARING EN BANC**

INTRODUCTION AND SUMMARY

The United States submits this brief in response to the Court's order of August 1, 2014. For the reasons set out below, the government respectfully suggests that the panel's opinion does not merit rehearing en banc.

Arizona law prohibits the issuance of a driver's license to anyone "who does not submit proof satisfactory to the department [of transportation] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D). The Arizona Department of Transportation publishes a list of acceptable documentation for establishing presence "authorized under federal law." Ariz. Dep't of Transp. Policy 16.1.2. That list previously included all employment authorization documents issued by the federal government.

On August 15, 2012, Arizona Governor Janice Brewer issued an executive order barring the Arizona Department of Transportation from accepting certain federal employment authorization documents as evidence that an applicant's presence in the United States is authorized under federal law. Arizona Executive Order 2012-06. The order targets beneficiaries of the Deferred Action for Childhood Arrivals (DACA) policy, under which the U.S. Department of Homeland Security (DHS) exercises its enforcement discretion to provide deferred action to certain aliens who came to the United States as children. In light of the executive order, the Arizona Department of Transportation revised its policy so that it no longer accepts federal employment authorization documents issued to DACA

recipients as proof of authorized presence in the United States. During the pendency of this litigation, the State further revised its policy to preclude the use of federal employment authorization documents issued to any recipient of deferred action.

The Immigration and Nationality Act and its implementing regulations, together with the enforcement authority and discretion committed to the Executive Branch, provide a federal scheme for alien classification and enforcement. A State may disagree with the federal government's enactment or implementation of federal law—as Arizona has made clear it does. But a State may not respond to that disagreement by conditioning eligibility for driver's licenses on its own notions of "authorized presence" and distinguishing among holders of federal employment authorization documents for that purpose, at least without a substantial state interest. Although States have significant discretion in determining what documentation is appropriate to establish eligibility for a driver's license, the reasons Arizona has given for denying licenses to DACA recipients and other deferred action grantees do not reflect substantial state interests in that area of traditional state regulation. The absence of a substantial state purpose supporting the distinctions Arizona seeks to draw indicates that its regulation of driver's licenses is a regulation of immigration and thus preempted by federal law.

The United States is of the view that review by the full Court is unwarranted. The panel reached the correct result, although the United States bases that conclusion on preemption principles without addressing the question of equal protection. The panel's holding

does not conflict with decisions of the Supreme Court, this Court, or any other court of appeals. And the case does not present an issue warranting review by the full Court. *See* Fed. R. App. P. 35(a). The interlocutory posture of the appeal further weighs against en banc review. The preemption and equal protection issues can be more fully developed on proceedings on a permanent injunction, and the district court can additionally consider the intervening revisions to the State's policy at that time.

STATEMENT

1. Federal Law

The Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163, as amended (codified at 8 U.S.C. §§ 1101 *et seq.*), "established a comprehensive federal statutory scheme for regulation of immigration and naturalization and set the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (internal quotation marks and citation omitted). The INA provides a detailed and complex scheme of alien classification. *See, e.g.*, 8 U.S.C. §§ 1101, 1151 *et seq.*, 1181 *et seq.* Regulations further refining these classifications and enforcement decisions by the Executive Branch are part of the federal scheme. *See* 8 C.F.R. pt. 214 (establishing classifications); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the [INA's] removal system is the broad discretion exercised by immigration officials."); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (same).

Under this scheme, aliens may be removed for having entered the country without authorization. *See* 8 U.S.C. §§ 1227(a)(1)(A) & (C), 1182(a)(6) & (7). "Federal officials . . . must decide whether it makes sense to pursue removal at all," and, "[i]f removal proceedings commence," whether to grant "discretionary relief allowing [the alien] to remain in the country or at least to leave without formal removal." *Arizona*, 132 S. Ct. at 2499. One way in which such discretion is exercised is through grants of deferred action, in which, on a case-by-case basis, the U.S. Department of Homeland Security may decline to institute removal proceedings, may terminate proceedings, or may decline to execute a final order of removal. *See American Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84 (1999). The practice of making such determinations has a long history, *see id.* (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)), and such decisions are an integral part of the federal immigration framework, *Arizona*, 132 S. Ct. at 2499.

Pursuant to this authority, on June 15, 2012, DHS announced the Deferred Action for Childhood Arrivals policy, which directs DHS officials to consider, on a case-by-case basis, exercising discretion in favor of certain aliens who were brought to the United States as children and who have resided here for at least five years. *See* Memorandum from Secretary Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 1 (June 15, 2012). The Secretary's memorandum states that if the exercise of discretion with respect to a particular alien is appropriate, DHS officials should not initiate removal proceedings or should defer

for a renewable period of two years any removal proceedings already initiated. *Id.* at 2. Qualifying aliens not already in removal proceedings may also apply for this deferred action status. *Id.* at 2-3. Individuals applying for deferred action under the DACA policy are also required to apply for federal employment authorization. *See* USCIS Form I-821D, Consideration of Deferred Action for Childhood Arrivals, http://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf ("All individuals filing Form I-821D . . . must also file Form I-765, Application for Employment Authorization[.]").

2. State Law

Arizona law prohibits the issuance of a driver's license to anyone "who does not submit proof satisfactory to the department [of transportation] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D). A list published by the Arizona Department of Transportation identifies the documentation that it will accept as establishing authorized presence. Ariz. Dep't of Transp. Policy 16.1.2.

Prior to the announcement of the DACA policy, the Department's list of acceptable documents included all employment authorization documents issued by the federal government. *See* Slip op. 7. On August 15, 2012, the day the DACA policy took effect, Arizona Governor Janice Brewer issued an executive order directing state agencies to bar DACA recipients from obtaining any public benefit or state identification. Arizona Executive Order 2012-06. Following the issuance of the executive order, the Arizona Department

of Transportation announced that it would not accept federal employment authorization documents issued to DACA recipients as proof of authorized presence. *See id.* at 8. The Department subsequently revised it policy, *see id.* at 9-10, to preclude the use of federal employment authorization documents issued to other recipients of deferred action, see 8 C.F.R. § 274a.12(c)(14). The Department continues to accept as proof of authorized presence federal employment authorization documents issued to other aliens, including applicants for adjustment of status or cancellation of removal, *see id.* § 274a.12(c)(9)-(10).[1]

3. Procedural History

Plaintiffs filed suit in the U.S. District Court for the District of Arizona, urging that Arizona's policy of denying driver's licenses to DACA recipients is preempted by federal law and inconsistent with principles of equal protection. The district court denied plaintiffs' motion for a preliminary injunction, holding that plaintiffs were likely to succeed on the merits of their equal protection claim but unlikely to suffer irreparable harm if the policy remained in effect during the pendency of the litigation.

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[1] Eligibility for federal employment authorization documents is not limited to the above-referenced individuals. Many other aliens may apply for and obtain such documents, 8 C.F.R. § 274a.12(c), and some individuals are entitled to such documents as an incident to their immigration status, *id.* § 274a.12(a). Arizona continues to accept all federal employment authorization documents as proof of authorized presence except for those issued to recipients of deferred action or deferred enforced departure, *id.* § 274.12(a)(11).

A unanimous panel of this Court reversed and remanded with instructions to enter a preliminary injunction. The panel first suggested that plaintiffs could likely prevail on their preemption claim if they could adequately develop the record. Slip op. 13-15. It further held that Arizona's policy is likely inconsistent with principles of equal protection because the State has offered no justification for treating DACA recipients differently from similarly situated individuals with federal employment authorization documents. *Id.* at 18-19. Relying on many of the same observations that underlie a preemption analysis, the panel concluded that Arizona's policy could not withstand review because there was no support in federal law for the State's disparate treatment of similarly situated aliens. *Id.* at 21. Instead, Arizona had "assume[d] for itself the federal prerogative of classifying noncitizens— despite the fact that '[t]he States enjoy no power with respect to the classification of aliens.'" *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 225 (1982)). The panel also rejected the State's other proffered grounds for denying driver's licenses to deferred action recipients, holding that none served to explain the distinction drawn by the State. *Id.* at 23-25. After further concluding that the likelihood of irreparable harm and other preliminary injunction factors weighed in plaintiffs' favor, the Court held that plaintiffs were entitled to a preliminary injunction. *Id.* at 26-28.

Judge Christen filed a concurring opinion stressing that, in her view, plaintiffs had already demonstrated a likelihood of success on their preemption claim. Slip op. 29. The concurrence observed that "Arizona's newly-crafted definition of 'authorized presence' is

unmoored from and unsupported by federal law." *Id.* Arizona has thus "ventured into an area—the creation of immigration classifications—that is the exclusive domain of the federal government." *Id.* The panel majority indicated its agreement with the substance of this analysis. *See id.* at 16-17 n.3.

ARGUMENT

Arizona's Policy Is Preempted by Federal Law

The panel reached the correct result in this case. Although the United States bases that conclusion on preemption principles without addressing equal protection, much of the panel's equal protection analysis supports a holding for plaintiffs on their preemption claim. The district court will have the opportunity to consider the preemption and equal protection arguments further on proceedings on a permanent injunction. Accordingly, review by the full Court is not warranted at this time.

A. The federal government's exclusive authority to establish immigration classifications is not controverted. *See Plyler v. Doe*, 457 U.S. 202, 225 (1982); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). That power is plainly "committed to the political branches of the Federal Government." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 81). Drawing upon its "plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders." *Id.*; *see, e.g.*, 8 U.S.C. §§ 1101, 1151 *et seq.*, 1181 *et seq.* Regulations further refining these classifications, as well as en-

forcement decisions by the Executive Branch, are part of the federal scheme. *See* 8 C.F.R. pt. 214 (establishing classifications); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The Executive Branch has long exercised its discretion to decline to pursue removal of particular aliens based on humanitarian concerns, resource constraints, and other policy considerations. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999).

While it is "'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, and to 'take into account the character of the relationship between the alien and this country,' only rarely are such matters relevant to legislation by a State." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 80, 85). As a general matter, "[t]he States enjoy no power with respect to the classification of aliens." *Id.*; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("[O]ur cases have . . . been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage."); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (recognizing the "overriding national interests which justify selective federal legislation that would be unacceptable for an individual State"). Accordingly, under the Supremacy Clause, States may not establish classifications that distinguish among aliens whom the federal government has treated similarly, or that are not otherwise supported by federal law. *See Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1070-71 (9th Cir. 2013). Doing so effectively creates a new classification and intrudes on this exclusively federal prerogative.

It is of course not the case that "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted" by the federal power to regulate immigration. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). "[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* The States retain power to regulate in areas that do not directly bear on immigration, even when they touch on that subject or in the course of their administration borrow certain standards from the federal scheme.

When the Supreme Court has sustained state laws that indirectly bear upon immigration, it has emphasized that the statutes at issue incorporate existing federal classifications of alien status and do not create new ones. For example, in upholding an Arizona law that directed courts to suspend or revoke the business licenses of instate employers that employ unauthorized aliens, the Court in *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1981 (2011), emphasized that the State had been careful to "ensur[e] that its law closely track[ed] IRCA's provisions in all material respects." As the Court observed, the licensing law at issue in that case "beg[an] by adopting the federal definition of who qualifies as an 'unauthorized alien.'" *Id.*; *see also Plyler*, 457 U.S. at 226 (acknowledging that "[t]he State may borrow the federal classification."). In considering whether state regulations are preempted, the Supreme Court has also looked to the strength of the state interest being vindi-

cated. *See, e.g., DeCanas*, 424 U.S. at 356-57. A state law that serves a substantial state interest in an area of traditional state concern is less likely to encroach on federal immigration law.

B. States generally enjoy substantial leeway in setting policies for licensing drivers within their jurisdiction. The provision of state driver's licenses is not an area of "dominant federal concern," *Whiting*, 131 S. Ct. at 1983, and most state regulations of driver's licenses do not impinge on the implementation of federal law. This may be true even if a state licensing scheme distinguishes among classes of aliens, at least if the classifications are borrowed from federal law and further a substantial state purpose. *See id.* at 1981; *cf. Plyler*, 457 U.S. at 226. Indeed, federal law contemplates that States may take federal alien classifications into account in administering their licensing schemes. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., § 202, 119 Stat. 231, 312 (49 U.S.C. § 30301 note).

Where, however, a State makes the operation of its licensing scheme depend on new alien classifications not supported by federal law, the preemption analysis is different. The broad authority States enjoy in regulating pursuant to their police power does not extend to the creation of alien classifications in furtherance of those interests. *Plyler*, 457 U.S. at 225 ("The States enjoy no power with respect to the classification of aliens."). Because the power to enact alien classifications is exclusive to the federal government, even State laws relating to matters otherwise within the core of the police power will generally be preempted where they distinguish among aliens in ways inconsistent with

federal law so as to effectively establish novel classifications.

Arizona has established classifications that find no support in federal law. As Judge Christen's concurrence observed, "Arizona did not merely *borrow* a federal immigration classification; it created a new one." Slip op. 29; *see id.* at 21. Arizona law prohibits the issuance of a driver's license or a nonoperating identification license to anyone "who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D). Although the state statute does not define what it means for an applicant's "presence" to be "authorized," Arizona Department of Transportation policy provides that federal employment authorization documents constitute "proof satisfactory" to establish such presence for some individuals but not for others. Ariz. Dep't of Transp. Policy 16.1.2. Since August 2012, the Department has not accepted employment authorization documents issued to DACA recipients as proof of authorized presence, even as it continues to accept employment authorization documents issued to other aliens, including applicants for adjustment of status or cancellation of removal, as proof sufficient to make the required showing. By drawing such distinctions, the State has impermissibly "assume[d] for itself the federal prerogative of classifying noncitizens." Slip op. 21.

The State has urged that its scheme merely incorporates federal law because its statute conditions eligibility for a license on a showing that an applicant's presence is "authorized *under federal law*." Ariz. Rev. Stat. Ann. § 28-3153(D) (emphasis added). Federal

law does not, however, include a classification of persons with "authorized presence." Arizona has sought to give content to that concept by treating federal employment authorization documents, among other documentation, as sufficient evidence of "authorized presence." But by selectively incorporating aspects of federal law, Arizona has engaged in a "sub-classification of aliens lacking lawful status into two new groups," Slip op. 31 (Christen, J., concurring), and impermissibly intruded on the exclusive domain of the federal government to make and administer alien classifications.

C. In considering state laws that touch on immigration, courts also look to the strength of the state interest being vindicated. *See, e.g., DeCanas*, 424 U.S. at 356-57. Where a State law serves a substantial state interest in an area of traditional state concern, a court is less likely to find that it encroaches on federal immigration law and its implementation by the Executive Branch. Accordingly, a State wishing to regulate in this area must identify a substantial state interest and show that its regulation is "reasonably adapted to the purposes for which the state desires to use it." *Plyler*, 457 U.S. at 226 (emphasis and internal quotation marks omitted). Arizona has failed to make that showing in this case.

There is no dispute that the State has granted tens of thousands of driver's licenses to aliens based on their provision of federal employment authorization documents. The State has failed to identify any reason why the same documents should not similarly suffice for plaintiffs. As the panel concluded, it is not apparent why, if such documents are sufficient to establish

that some bearers are currently authorized to be present in the United States, they are not adequate to make that showing for all bearers. Slip op. 21.

The State endeavors to justify its distinction on the ground that individuals with pending applications for adjustment of status or cancellation of removal are "'on a path to lawful status,' while DACA recipients are not." Slip op. 20. But this proffered justification simply reflects another state judgment about the classification of aliens. As the panel observed, the State has not "defined 'a path to lawful status' in a meaningful way," *id.*, and certainly not in a way that finds support in federal law. Individuals with pending applications for adjustment of status or cancellation of removal "are not in the United States pursuant to any statutory provision while their applications are pending." *Id.* at 18. This Court has previously observed with regard to adjustment of status that "the submission of an application does not connote that the alien's immigration status has changed, as the very real possibility exists that the INS will deny the alien's application altogether." *Id.* (quoting *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011)). Arizona has not explained how the potential for future relief relates to a current classification of "authorized presence."

The other bases for the distinction offered by the State similarly fail to demonstrate that the denial of driver's licenses to plaintiffs relates to a substantial state purpose and does not intrude on federal immigration law. Arizona has suggested that if the DACA policy were rescinded, it might be necessary for the State to revoke driver's licenses issued to DACA recipients. The State further urges that if these individuals

were subsequently removed from the country, persons injured by their conduct might be left without recourse. But, as the panel concluded, that logic applies with equal force to individuals with pending applications for adjustment of status or cancellation of removal, whose applications may be denied at any time, and yet the State has determined to provide licenses to such individuals if they can present federal employment authorization documents. Slip op. 23-24.

Other explanations offered by the State are at odds with the record. For example, although Arizona expressed concern that DACA recipients may use a driver's license to improperly access state benefits for which they are ineligible, state officials admitted that they have no basis for believing that might happen. Slip op. 23. Similarly, there is no apparent basis for the State's assertion that issuing licenses to DACA recipients might expose the State to legal liability for 80,000 unauthorized immigrant drivers. The State has not identified what the basis for legal liability would be. Although the State has already issued approximately 47,500 licenses to holders of federal employment authorization documents, it has not identified a single instance in which it has faced liability for issuing a license to a noncitizen. *Id.* In addition, the reference to "80,000" is significantly at variance with the fact that fewer than 15,000 Arizonans had applied for deferred action under the DACA policy at the time of the panel's decision. *Id.*

The foregoing suggests that Arizona's policy is motivated by disagreement with federal immigration policy. This is not a legitimate state interest. Arizona may not substitute its judgment for the federal gov-

ernment's when it comes to establishing classifications of alien status. This is all the more true in these circumstances, where Congress, through the REAL ID Act, has expressed its judgment that "approved deferred action status" is "lawful status" that affords a period of "authorized stay" for purposes of issuing identification. The Act establishes minimum standards for participating States to adopt in order for state-issued driver's licenses to satisfy federal security criteria. Under the Act, approved deferred action status is listed among the "lawful status[es]" for which participating States may issue licenses. Pub. L. No. 109- 13, Div. B., § 202(c)(2)(B) (capitalization omitted). The Act additionally provides that, for individuals with temporary status, like deferred action grantees, States should issue a temporary license that "shall be valid only during the period of time of the applicant's *authorized stay* in the United States." *Id.* § 202(c)(2)(C)(ii) (emphasis added). That States are not required to participate in this program does not detract from Congress's judgment for these purposes that deferred action recipients are "authorized" to stay in the United States for the period of the deferral. Under these circumstances, a State must at the very least advance a substantial justification in an area of traditional state concern in order to justify classifications different from those proposed by Congress. Arizona has not done so here.

In sum, the result reached by the panel is correct; its holding does not conflict with any decision of the Supreme Court, this Court, or another court of appeals; and the case does not present an issue warranting review by the full Court. The petition for rehearing

en banc therefore should be denied. *See* Fed. R. App. P. 35(a).

CONCLUSION

For the foregoing reasons, the full Court should not rehear this case.

Respectfully submitted,

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SEPTEMBER 2014

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF KEVIN D. BAILEY

I, Kevin D. Bailey, have personal knowledge of the following facts and declare:

1. I am an Attorney employed by the State of Wisconsin Department of Health Services. As part of my duties, I routinely work with the Wisconsin Medical Assistance (Medicaid) program and am familiar with the expenditure of funds by that program.

2. The Wisconsin Medicaid program provides financial assistance and benefits to individuals with limited financial resources. Wisconsin Medicaid has two primary components. "EBD" Medicaid provides elderly, blind, and disabled individuals traditional MA services like hospital services, physician services, and nursing home services. BadgerCare Plus provides health care coverage to low-income children, their parents, and pregnant women. Certain other individuals receive Medicaid through one of the state's Medicaid waiver programs. In

addition to the traditional services identified above, Medicaid pays for a broad range of medically necessary health care services for recipients, such as dental, vision care, laboratory services, and mental health and substance abuse services. In general, to be eligible BadgerCare Plus an individual's income must not exceed certain limits and the individual must meet other non-financial criteria, including the following: be a Wisconsin resident; cooperate in establishing medical support and third-party liability for medical expenses; provide or apply for a social security number, and cooperate with requests to verify information relevant to their participation in the BadgerCare Plus program.

3. The State of Wisconsin administers medical assistance payments to providers. A portion of each payment is funded with state tax dollars from the Wisconsin treasury.

4. Only an individual who is a U.S. citizen, who is an alien lawfully admitted for permanent residence, or who is otherwise permanently residing in the United States under color of law may directly enroll to receive medical assistance benefits in Wisconsin. Wisconsin Medicaid does provide financial medical assistance to aliens not lawfully admitted for permanent residence, but who are otherwise eligible for medical assistance benefits, for treatment of emergency medical conditions pursuant to federal law, 42 U.S.C. § 1396b(v), and Wisconsin Statute, Wis. Stat. § 49.45(27).

5. If aliens, not lawfully admitted for permanent residence, are allowed to remain in Wisconsin in a deferred action status, it is anticipated that expenditure of additional sums from the Wisconsin treasury will be required to provide medical assistance to those individuals for treatment of emergency medical conditions. Because it is not clear how many aliens would remain in deferred action status, it is uncertain how large that additional expenditure would be: Based upon experience in Wisconsin, such emergency treatment may be ongoing and is not limited in duration or amount.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 23, 2014.

/s/ KEVIN D. BAILEY
KEVIN D. BAILEY
Attorney, Office of Legal Counsel
Wisconsin Department of Health Services

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DAVID G. BAKER

My name is David G. Baker and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the Deputy Director of Law Enforcement Operations at the Texas Department of Public Safety ("DPS"). In this capacity, I oversee DPS's law enforcement divisions, including coordination of DPS's border security operations.

2. I was appointed to serve as Deputy Director in September 2011. Immediately prior to my current position, I served as Assistant Director/Chief of the Texas Highway Patrol.

3. Along with other local, state, and federal law enforcement agencies, DPS personnel conduct security operations along the border between Texas and Mexico.

4. In furtherance of its border security function, DPS participated in a multi-agency law enforcement

surge operation from September 15, 2013 through October 4, 2013 (hereinafter referred to as "Operation Strong Safety I"). Operation Strong Safety I temporarily increased the patrol presence in the State's Rio Grande Valley area in an effort to combat criminal activity in the area. Leading up to the implementation of this operation, there had been a substantial increase in the number of U.S. Border Patrol apprehensions of undocumented individuals from countries other than Mexico (including El Salvador and Guatemala) and unaccompanied children in the Rio Grande Valley. Resources from around the State were deployed to the Rio Grande Valley to support Operation Strong Safety I by conducting around-the-clock patrols on, above, and along the Rio Grande River.

5. DPS estimates that it incurred approximately $3.4 million in expenditures attributable to Operation Strong Safety I. These expenditures reflect costs associated with employee overtime, travel, aviation, and other expenses that DPS would not have incurred but for this emergency operation.

6. On June 18, 2014, Governor Rick Perry, Lieutenant Governor David Dewhurst, and Speaker of the House Joe Straus directed DPS to plan and implement another surge operation of increased law enforcement in Texas border counties (hereinafter referred to as "Operation Strong Safety II"). Operation Strong Safety II, which began on June 23, 2014, was intended to address the criminal activity associated with the growing humanitarian crisis in and around the border. U.S. Border Patrol apprehensions of individuals crossing the Texas-Mexico border were occurring at historic levels, totaling over 40,000 per month for the three

months before Operation Strong Safety II, with much of this increase centered in the Rio Grande Valley area. The influx of unaccompanied children and other undocumented immigrants crossing the border presented a substantial threat of increased drug trafficking, human smuggling, and other violent crime. The State's directive authorized DPS to utilize all existing appropriated funds in support of Operation Strong Safety II.

7. Operation Strong Safety II remains ongoing to this day. During the operation, DPS has worked in coordination with its local, state, and federal law enforcement partners to conduct around-the-clock, ground, air, and marine saturation patrols on the Texas-Mexico border.

8. DPS estimates that it incurred approximately $23.49 million in expenditures attributable to Operation Strong Safety II from the beginning of the initiative through November 2014. These expenditures reflect costs associated with employee overtime, travel, aviation, and other expenses that DPS would not have incurred but for this emergency operation.

9. DPS projects that from December 2014 through August 2015, it will incur approximately $1.3 million per week, or a total of $49.4 million, in additional expenditures associated with Operation Strong Safety II. These projected expenditures reflect costs that DPS would not have to incur but for this emergency operation.

10. Attached as Exhibit 1 to this declaration is a true and correct copy of a DPS Budget/Organization Activity Report, generated on December 2, 2014, detailing certain estimated DPS border security expenditures

from September 2012 through November 2014 and projected DPS border security expenditures from December 2014 through August 2015, including expenditures attributable to Operation Strong Safety I and Operation Strong Safety II. This record is kept by DPS in the course of its regularly conducted activity, and it was DPS's regular practice for an employee or representative of DPS, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion, or diagnosis.

11. Based on my experience with DPS, including my first-hand knowledge and oversight of Operation Strong Safety I and Operation Strong Safety II, I anticipate that the need for additional law enforcement resources along the Texas-Mexico border will continue. It also is my belief that any increase in the incentives for individuals to come to the United States will lead to a greater need for additional law enforcement resources along the border.

12. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6 day of Jan., 2015.

/s/ DAVID G. BAKER
DAVID G. BAKER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF LISA DAWN-FISHER

My name is Lisa Dawn-Fisher, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the Associate Commissioner for School Finance/Chief School Finance Officer at the Texas Education Agency ("TEA"). I have worked for TEA since October 2002, previously serving as the Deputy Associate Commissioner for School Finance and as the Assistant Director for TEA's State Funding Division.

2. In my current position, I oversee TEA's school finance operations, including the administration of the Foundation School Program and analysis and processing of financial data. My responsibilities also include representing TEA in legislative hearings and school finance-related litigation.

3. In response to requests from the Legislature and the State's leadership, TEA has previously con-

ducted analyses of expenditures that the State may incur if there is a large influx of unaccompanied children ("UAC") coming into the Texas public school system.

4. The U.S. Department of Education has advised TEA that UAC located in U.S. Health and Human Services ("HHS") shelters will not be enrolled in the local school systems. However, when students are released to an appropriate sponsor—usually a parent, family member, or other relative—while awaiting immigration proceedings, they can enroll in local schools regardless of their or their parents' actual or perceived immigration or citizenship status. State law also requires that children attend school up to a certain age, generally 18 years old unless the child already has obtained a high school diploma or a General Educational Development certificate (among other exceptions).

5. Pursuant to the Individuals with Disabilities Education Act, local school districts have an obligation to identify students with disabilities who may be eligible for special education services. Guidance received from the U.S. Department of Education indicates that a school district has no obligation to find and serve children who are being housed in federal detention centers; this obligation applies once the children are placed with foster parents or a family in Texas.

6. School funding is comprised of federal, state, and local funds. The funding is based on projections made by each school district the previous school year. Districts often experience increases in their student enrollment from year to year, and the State plans for an increase of approximately 80,000 students in enroll-

ment growth across Texas each year. However, a substantial influx of new students into the Texas public school system could pose a serious burden on the State and local school districts, particularly if there is limited opportunity to plan for such an increase.

7. If there is a significant increase of new students during a school year, TEA could make adjustments to the numbers of students that the State is paying for during that school year. TEA has the ability to provide school districts with a way to submit revised attendance figures to help the funding keep pace with student enrollment. Currently, all the costs of educating these students would be borne by the State.

8. To the extent that an influx of new students is attributable to UAC, these students would add to the State's incremental education costs just like any other type of enrollment growth.

9. TEA estimates that the average funding entitlement for 2015 will be $7,903 per student in attendance for an entire school year. Assuming that a student qualifies for the additional Bilingual and Compensatory Education weighted funding (for which most, if not all, UAC presumably would qualify), it would cost the State $9,473 to educate each student in attendance for the entire school year.

10. The Foundation School Program, which serves as the primary funding mechanism for providing state aid to public schools in Texas, currently has a surplus of funds that is expected to continue in fiscal year 2015 (September 2014 – August 2015). As of November 2014, this surplus was $556 million, which could accommodate approximately 58,671 additional students fund-

ed at $9,473 per student. Notwithstanding this surplus, the Foundation School Program funds that are utilized to cover the State's costs of providing public education to UAC in Texas would not otherwise be spent and instead would remain part of the surplus.

11. TEA has not received any information directly from the federal government regarding the precise number of UAC in Texas. As a result, TEA does not know whether any influx of new students into the State's public school system will exceed the number of additional students that could be accommodated by the Foundation School program surplus. However, I am aware that data from the HHS's Office of Refugee Resettlement indicates that 7,409 UAC were released to sponsors during the 12-month period covering October 2013 through September 2014. Assuming that each of these children is educated in the Texas public school system and qualifies for Bilingual and Compensatory Education weighted funding (such that the State's annual cost to educate each student would be roughly $9,473), the total one-year cost to educate this group of children would be approximately $70.18 million for the year.

12. Based on my knowledge, expertise, and research regarding school finance issues impacting the State of Texas, I anticipate that the total costs to the State of providing public education to UAC will rise in the future to the extent that the number of UAC enrolled in the State's public school system increases.

13. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6 day of Jan., 2015.

/s/ LISA DAWN-FISHER
LISA DAWN-FISHER

/s/ NELDA C. EISENBECK
NELDA C. EISENBECK

JAN. 6, 2015

[NOTARY STAMP OMITTED]

Deferred Action for Childhood Arrivals

		Month								Cumulative Totals
		Aug-12*	Sep-12	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	
Intake	Accepted	48,052	104,366	112,660	71,115	44,816	31,023	30,263	29,709	472,004
	Rejected	1,909	3,460	3,565	2,383	1,571	1,375	1,281	1,234	16,778
	Total received	49,961	107,826	116,225	73,498	46,387	32,398	31,544	30,943	488,782
	Average accepted/day	3,696	5,493	5,121	3,556	2,241	1,477	1,593	1,415	3,045
Biometrics	Scheduled	18,616	105,439	98,430	87,037	42,062	42,678	30,128	32,453	456,843
Case Review	Under review	0	29,747	134,858	152,245	172,533	153,508	132,255	116,541	-
	Approved	0	1,687	28,106	47,916	48,079	50,047	45,484	47,042	268,361
	Denied	0	0	6	15	73	173	269	841	1,377

*August data from August 15 - August 31, 2012

Please note: The report reflects the most up-to-date estimate available at the time the report is generated.

Report Created: April 10, 2013

Date range: August 15, 2012 - March 31, 2013

Systems: Biometrics Capture Systems, CIS Consolidated Operational Repository (CISCOR)

USCIS Office of Performance and Quality (OPQ)

U.S. Citizenship and Immigration Services

Beginning in April 2013, the Deferred Action for Childhood Arrivals reporting period will change from a mid-month to an end-of-month cycle. In addition, beginning with the April 2013 report, the reports will include updates to data previously reported based on the availability of data as the DACA process progresses.

Deferred Action for Childhood Arrivals

Top Countries of Origin	Accepted to Date	Approved to Date
MEXICO	354,002	209,978
EL SALVADOR	18,949	10,840
HONDURAS	12,603	6,019
GUATEMALA	11,817	6,424
SOUTH KOREA	7,030	5,476
PERU	6,631	4,468
BRAZIL	5,589	3,374
COLOMBIA	4,998	3,058
ECUADOR	4,814	3,048
PHILIPPINES	3,315	2,370
ARGENTINA	2,970	1,875
INDIA	2,698	1,750
JAMAICA	2,584	1,103
VENEZUELA	2,206	1,260
DOMINICAN REPUBLIC	2,039	992
TRINIDAD AND TOBAGO	1,946	959
BOLIVIA	1,490	940
COSTA RICA	1,441	930
URUGUAY	1,312	876
PAKISTAN	1,297	723

Residence	Accepted to Date	Approved to Date
CALIFORNIA	134,167	73,104
TEXAS	76,438	40,297
NEW YORK	26,365	12,324
ILLINOIS	24,928	10,055
FLORIDA	20,764	9,065
NORTH CAROLINA	17,006	6,425
ARIZONA	16,653	10,592
GEORGIA	15,417	8,647
NEW JERSEY	10,390	8,483
COLORADO	10,105	6,050
WASHINGTON	9,732	5,653
VIRGINIA	7,808	3,619
NEVADA	7,514	2,566
OREGON	6,661	4,271
MARYLAND	6,241	4,315
INDIANA	6,105	2,309
UTAH	5,437	3,413
MASSACHUSETTS	5,411	2,536
TENNESSEE	4,859	1,714
WISCONSIN	4,190	2,581
KANSAS	4,021	2,468
SOUTH CAROLINA	3,930	2,540
OKLAHOMA	3,842	2,086
MINNESOTA	3,683	2,371
MICHIGAN	3,663	2,345
PENNSYLVANIA	3,408	2,120
ARKANSAS	3,210	2,093

Residence	Accepted to Date	Approved to Date
CONNECTICUT	3,108	2,130
NEW MEXICO	2,976	1,591
OHIO	2,497	1,555
ALABAMA	2,378	1,546
MISSOURI	2,053	1,211
NEBRASKA	2,047	1,405
IDAHO	1,898	1,153
KENTUCKY	1,816	1,166
IOWA	1,697	1,172
LOUISIANA	1,187	741
MISSISSIPPI	881	583
DELAWARE	857	604
RHODE ISLAND	787	481
DISTRICT OF COLUMBIA	458	178
WYOMING	346	189
NEW HAMPSHIRE	229	142
HAWAII	201	98
SOUTH DAKOTA	156	95
PUERTO RICO	116	41
WEST VIRGINIA	65	49
VIRGIN ISLANDS	53	19
ALASKA	52	27
NORTH DAKOTA	27	12
MAINE	24	14
MONTANA	24	8
OTHER	20	8
GUAM	13	11

U.S. Citizenship and Immigration Services

Please note: The report reflects the most up-to-date estimate available at the time the report is generated.
Report Created: April 10, 2013
Date range: August 15, 2012 - March 31, 2013
Systems: CIS Consolidated Operational Repository (CISCOR)
USCIS Office of Performance and Quality (OPQ)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF KARL ESCHBACH, Ph.D.

My name is Karl Eschbach, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

I. Qualifications

1. I am a demographer, with a Ph.D. from the department of sociology at Harvard University (1992), and a post-doctoral traineeship in demography sponsored by the National Institute of Child Health and Human Development at the University of Wisconsin, Center for Demography and Ecology (1993-1995). I am Professor and Director of Population Research at the University of Texas Medical Branch in Galveston, Texas.

2. My research specializations are in the areas of racial and ethnic demography and health disparities, with a particular focus on Hispanic and the American Indian populations. I have published peer-reviewed

research articles on illegal migration and on health and healthcare use among immigrants. I have served as the elected Chair of the Caucus of Refugee and Immigrant Health in association with the American Public Health Association, and have served by appointment of the Secretary of Veterans Affairs on the Department of Veterans Affairs Health Services Research and Development Scientific Merit Review Board, with a principal assignment to evaluate proposals pertaining to population disparities in health care use and outcomes. I was appointed by Governor Rick Perry to serve as the State Demographer of Texas, and held this position from 2008 to 2010. As the State Demographer, I had a statutory responsibility to advise the legislative and executive branches of the Government of Texas on the implications of demographic trends on State service demands. As part of these duties, I reviewed current information about the volume of unauthorized migration to the state of Texas.

3. Attached to this declaration are true and correct copies of the following documents:

- Appendix 1 includes my curriculum vitae and lists my publications in the last ten years.
- Appendix 2 sets forth the cases in which I have testified in deposition or at trial during the last four years.

II. Scope of Inquiry

4. I have been retained in this case by the Office of the Attorney General of Texas to analyze the following three issues: (1) whether the 2012 Deferred Action for Childhood Arrival (DACA) program caused an increase

in the unauthorized immigrant population, and whether the 2012 Deferred Action for Parental Accountability (DAPA) program likely would cause a concomitant increase in the unauthorized immigrant population; (2) the method for counting the unauthorized immigrant population and the number of unauthorized immigrants that reside in Texas; and (3) whether unauthorized immigrants receive a disproportionate amount of uncompensated healthcare.

III. Summary of Opinions

5. Based on my education, qualifications, experience, and knowledge of the relevant scientific literature, the following findings are offered as my expert scientific opinion.

a. It is my opinion that DAPA will discernibly and significantly increase unauthorized immigration to the United States in two ways. First, policies like DACA and DAPA will have a positive effect on increasing the size of the unauthorized population. These policies, which offer deferred action status and work authorization to eligible unauthorized individuals, encourage those eligible to stay in the United States and incentivizes other ineligible unauthorized immigrants to remain in the United States with the hope that they will be the beneficiaries of a future adjustment of status. As a result, the number of unauthorized immigrants will increase in the United States by making self-deportation a less attractive option. Second, the DAPA program will likely make it more attractive for unauthorized immigrants to migrate to the United States. Given that the DAPA

program is the second time the government has offered deferred action status to a class of unauthorized immigrants and has provided them work authorizations, individuals may be encouraged that if they enter the United States illegally, the government will grant them the same benefits in a future program. It is therefore reasonable to conclude that with the implementation of the DAPA program, other things equal, we will see similar patterns of increased migration of unauthorized immigrants just as was present post-DACA.

b. It is my opinion that the low rates of private market health insurance coverage for unauthorized immigrants residing in the United States, as well as their exclusion from coverage from most public programs and from market exchanges under the Affordable Care Act result in disproportionate use of uncompensated care, resulting in a substantial burden on states and sub-state jurisdictions with heavy representation of unauthorized immigrant populations.

The basis for each of these findings is explained in more detail below.

IV. Counting the Unauthorized Immigrant Population

6. Following the implementation of the Immigration Reform and Control Act (IRCA), trends in resident unauthorized populations have been studied using a residual methodology to infer the size and characteristics of the unauthorized population by subtracting the known legally present immigrant population from the

total immigrant population estimated from United States Census Bureau surveys.[1]

7. This methodology has gained wide acceptance among demographers and immigration scholars. Concordant estimates of the resident unauthorized population have been regularly produced using this methodology by the statistics office of the Department of Homeland Security,[2] and by the Pew Hispanic Center, a non-profit research institute.[3] A retrospective annual time series for the period from 1990 to 2010 was published as peer-reviewed research.[4]

8. Table 1 below shows that the estimates of the size of the unauthorized population produced in these three implementations of the residual methodology are highly concordant.

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[1] Robert Warren & Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 DEMOGRAPHY 375 (1987); Frank D. Bean et al., *The Quantification of Migration Between Mexico and the United States*, in 1 MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 1-89 (Mexican Ministry of Foreign Affairs & U.S. Comm'n on Immigration Reform, 1998).

[2] Bryan Baker & Nancy Rytina, Dep't of Homeland Security, Office of Immigration Stat., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (2013).

[3] Jeffrey S. Passel & D'Vera Cohn, Pew Research Ctr. Hispanic Trends Project, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14* (Nov. 18, 2014).

[4] Robert Warren & John Robert Warren, *Unauthorized Immigration to the United States: Annual Estimates and Components of Change, by State, 1990 to 2010*, 47 INT'L MIGRATION REV. 296 (2013).

Table 1: Estimated Unauthorized Immigrant Resident Population using the Residual Method, 3 Sources, for Selected Years

Year	Department of Homeland Security	Pew Hispanic Center	Warren & Warren
		United States	
1990	Na	na	3,500
2000	8,460	8,600	8,600
2007*	11,780	12,200	11,981
2010	11,590	11,400	11,725
2012	11,430	11,200	Na
2013	Na	11,300	Na
		Texas	
1990	na	na	0.440
2000	1,090	1,050	1,127
2007*	1,680	1,550	1,616
2010	1,770	1,650	1,608
2012	1,830	1,650	Na

Sources: Baker & Rytina, *supra* note 2; Warren & Warren, *supra* note 4; Passel & Cohn, *supra* note 3.

*2007 is the peak year to date for the unauthorized population of the United States in all three estimate series, with subsequent declines attributable to the effects of the recession in the U.S. economy on labor demand.

9. The size of the 2010 resident unauthorized population in the United States was between 11.4 and 11.7 million in each estimated series. The size of the estimated unauthorized resident population in Texas was between 1.6 and nearly 1.8 million. While the estimates vary because of the use of different data series and slightly different assumptions about detailed components of the estimate, these results are highly consistent as to the current size of the population and have been widely accepted in peer-reviewed demographic literature.

V. The Influence of DACA and DAPA on Unauthorized Immigrant Migration Patterns

10. To consider the effect of DACA and DAPA, it is important to draw on a conceptual understanding of how these policies are likely to affect the behavior of

unauthorized immigrants. Unauthorized migration is a process that occurs over time rather than a fixed event. Potential unauthorized migrants face an initial decision about whether to make an unauthorized entry. Subsequently, migrants must make continuous decisions about whether to remain in the United States or return to their country of origin, and if the latter, whether to return to the United States. These decisions also influence, and are influenced by, decisions about whether to form a family, where that family will locate, and the development of job-specific skills.[5]

11. The most important factors influencing these choices are likely to be based on relative wages and job opportunities in the United States and in the country of origin.[6] Immigration policies, including the level of border and workplace enforcement, also represent one factor that influences an individual's decision whether to migrate or not to migrate to the United States.[7]

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[5] Douglas S. Massey & Kristin E. Espinosa, *What's Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOC. 939 (1997).

[6] Gordon H. Hanson, *Illegal Migration from Mexico to the United States*, 44 J. ECON. LITERATURE 869 (2006); Gordon H. Hanson & Antonio Spilimbergo, *Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border*, 89 AM. ECON. REV. 1337 (1999).

[7] Catalina Amuedo-Dorantes et al., *How Do Tougher Immigration Measures Affect Unauthorized Immigrants?*, 50 DEMOGRAPHY 1067 (2013); Pia M. Orrenius & Madeline Zavodny, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 DEMOGRAPHY 437 (2003); Hanson & Spilimbergo, *supra* note 6.

12. The dynamism of the unauthorized immigrant population is reflected in the following table:

Table 2: Estimates of the Total Unauthorized Immigrant Population of the United States and Annual Components of Population Change: 1990-2010

					Method of Leaving the Population			
Year	Unauthorized Immigrants, Jan. 1 (1)	Annual Net Change (2) = (3) – (4)	Entered the Population (3)	Left the Population (4) = Σ (5 to 8)	Emigrated (5)	Adjusted to Lawful Status (6)	Removed by DHS (7)	Died (8)
2010	11,725							
2009	11,899	(174)	384	558	243	104	165	46
2008	12,000	(110)	439	549	252	100	150	46
2007	11,981	27	558	531	288	94	183	46
2006	11,714	267	749	482	256	64	117	45
2005	11,317	397	873	476	250	70	103	44
2004	10,978	339	813	474	247	84	100	42
2003	10,692	286	779	493	244	120	88	41
2002	10,259	434	906	473	237	115	81	40
2001	9,620	638	1,146	508	223	178	71	37
2000	8,600	1,020	1,389	369	198	75	65	33
1999	7,827	773	1,132	358	198	60	63	35
1998	7,210	616	954	338	182	61	65	30
1997	6,763	446	739	311	170	54	59	28
1996	6,291	472	756	284	161	53	41	26
1995	5,720	571	822	251	150	42	36	24
1994	5,233	467	700	233	138	38	33	22
1993	4,923	327	557	229	130	46	34	20
1992	4,587	339	559	220	124	43	34	19
1991	4,135	452	649	197	116	33	29	17
1990	3,500	635	816	181	103	38	23	15

Source: Warren & Warren, *supra* note 4.

13. This table shows that the unauthorized immigrant population reflects not only new arrivals but also four ways in which people leave the population: (i) emigration or voluntary self-deportation; (ii) adjustment to lawful status; (iii) removal; and (iv) mortality.

14. DACA and DAPA represent important policy choices that operate by deferring enforcement action in ways that increase eligibility to work and allow individuals to remain in the United States without fear of immediate deportation. The DACA program, which was initiated by President Obama in June 2012, allows certain unauthorized immigrants who entered the country before their sixteenth birthday to receive work

authorization and exemption from deportation. At the initiation of this program, the Pew Research Center estimated that up to 1.7 million people might be eligible for the DACA deferred action status.[8] It is my understanding that as of December 19, 2014, USCIS has granted DACA status to about 636,000 individuals.

15. In November 2014, President Obama announced the DAPA program, purportedly aimed at reducing unauthorized immigration at the border. Among the initiatives included in the executive action, the new policy would allow parents of United States citizens and lawful permanent residents who have been present in the country since January 1, 2010 to request deferred action and employment authorization for three years, in the new DAPA program. DHS has estimated that the new deferred action program could extend to approximately 4 million individuals nationwide.[9]

16. DACA and DAPA will impact decisions on whether to remain or come to the United States with respect to three groups: (i) unauthorized immigrants directly eligible for the programs; (ii) potential migrants; and (iii) other unauthorized immigrants already present in the United States. As to each of these categories, DACA and DAPA change the calculation of

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[8] Jeffrey S. Passel & Mark Hugo Lopez, Pew Research Ctr. Hispanic Trends Project, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules* (Aug. 14, 2012).

[9] Memorandum Opinion for the Secretary of Homeland Security, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 30 (Nov. 19, 2014).

benefits associated with coming to, or remaining in, the United States.

17. For those individuals directly covered by DACA and DAPA, the policies increase the size of the unauthorized population insofar as they defer the deportation of unauthorized immigrants who meet certain eligibility criteria and who would otherwise have been identified by the Department of Homeland Security and subject to deportation within the time period specified in the programs.[10] A second unambiguous effect is that the programs will reduce the incentive to self-deport based on the provision of work authorization and the removal of fear of deportation.

18. DACA and DAPA may also influence the decisions of potential migrants and other unauthorized immigrants already present in the United States. Specifically, these individuals may be encouraged by these programs to immigrate without authorization or to remain in the United States because of a potential ability to receive an adjustment despite a failure to qualify

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[10] Recent estimates by Warren and Warren suggest an annual removal rate for the resident unauthorized immigrant population in the range of 1 percent and an estimated emigration rate in the range of 2 to 3 percent. Applying these rates to the population offered deferred action pursuant to DACA and DAPA provides a crude estimate of an increase in the stock of resident unauthorized immigrants of 3 percent of the enrollees in the program for each year of their participation. The actual number of reduced deportations/deferrals may vary if the emigration/deportation rate in the program eligible population is different from the overall number, or if eligible unauthorized immigrants choose to emigrate voluntarily despite their benefits under DACA and DAPA. *See* Warren & Warren, *supra* note 4.

for its provisions, or in anticipation that the programmatic relaxing of enforcement will be further extended in the future to them or their family members.

19. In short, the effect of DACA and DAPA is to incentivize residents of other countries to come to the United States. The policies also encourage individuals who are already present in the United States to remain with the hope that they would have a future adjustment of status. Based on my education, qualifications, experience, and knowledge of the relevant scientific literature, it is my expert opinion there will be a positive effect on the size of the unauthorized immigrant population in Texas and elsewhere in the United States based on DACA and DAPA.

VI. The Failure of Immigration Policies to Reduce Unauthorized Immigrant Flows Into the United States

20. In considering the effects of DACA and the potential effects of DAPA, we can turn to the literature regarding the largest status adjustment policy in United States history. IRCA was enacted on November 6, 1986, and at that time, was a major policy change in United States immigration law. One of the main provisions of the Act was a legalization program that granted amnesty to unauthorized immigrants who could prove they had resided in the United States continuously since January 1, 1982. As a result of IRCA, approximately 3 million unauthorized immigrants were granted legal permanent resident status.

21. The original promise of IRCA was that the amnesty, together with increased enforcement and provisions for employer sanctions, would reduce the impacts

of unauthorized migration by the combination of these components. The logic of the policy is that the adjustment in status of a substantial portion of the resident unauthorized population would provide a practical accommodation to the presence of a large resident unauthorized immigrant population that occupied an important role in the labor markets of areas where the population was concentrated, while enhanced enforcement would reduce future growth of the population.[11]

22. In the 25 years after IRCA was implemented, there has not been a significant decrease in the number of unauthorized immigrants entering the United States. Instead, the unauthorized population has surged to 11.7 million individuals since its implementation. Further, Warren and Warren's estimates imply a growth of 8.5 million between 1990 and 2007, nearly 3 times the legalized population at the time IRCA was passed.[12]

23. Evaluations of the impact of IRCA have concluded that the program failed to accomplish its goals.[13] The resident unauthorized immigrant population was initially reduced through adjustments in status but subsequently returned to its previous trajectory of growth, as reflected in Table 1. Many analysts concluded that the principal restructuring that

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[11] Jeffrey S. Passel et al., *Undocumented Migration Since IRCA: An Overall Assessment*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S 251-264 (Frank D. Bean et al. eds., 1990).

[12] *See* Warren & Warren, *supra* note 4.

[13] Katharine M. Donato et al., *Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act*, 29 DEMOGRAPHY 139 (1992); Orrenius & Zavodny, *supra* note 7.

occurred in response to IRCA was longer sojourns or permanent shifts of residence in the United States by persons who would have otherwise have spent larger portions of time in their country of origin.[14] This flow of unauthorized entrants across the border was responsive to many influences, including primarily perceptions of relative employment opportunities and wage rates.[15]

24. One source of data used to evaluate trends in unauthorized immigration flows is the time series of apprehensions of persons attempting entry without authorization. The interpretation of trends in apprehension data is not straightforward.[16] For example, an increase in apprehensions may reflect an increased volume of attempted unauthorized entry, or it may reflect a change in the effectiveness of border enforcement or in the efficiency of smuggling operations in transporting unauthorized immigrants past border surveillance without detection. Apprehension and prompt removal of persons who attempt entry may inflate apprehension counts relative to the volume of persons who successfully enter the United States illegally if unauthorized immigrants make repeated attempts to enter until they are successful. Analysts have identified some of these confounding influences on trend data on immigrations, and find it useful to iden-

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[14] Belinda I. Reyes et al., Pub. Policy Institute of Cal., *Holding the Line? The Effect of the Recent Border Build-Up on Unauthorized Immigration* (2002).

[15] Hanson, *supra* note 6; Hanson & Spilimbergo, *supra* note 6.

[16] Thomas J. Espenshade, *Using INS Border Apprehension Data to Measure the Flow of Undocumented Migrants Crossing the U.S.-Mexico Frontier*, 29 INT'L MIGRATION REV. 545 (1995).

tify trends in migration flows, with allowance for confounders.[17]

25. The number of unaccompanied children (UAC) apprehensions has increased in the past six years and has surged in the last two years. At the time DACA was initiated, the yearly total for border apprehensions of UAC in FY 2012 was 24,481. Post-DACA, the number of UAC border apprehension doubled, with the United States Border Patrol reporting that it apprehended 68,631 UAC in FY 2014.

Source: U.S. Border Patrol. Total Unaccompanied Children (0-17 Years Old) Apprehensions, FY 2010 FY 2014, *available at* http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10.-FY14.pdf..

26. Given that DACA is a recent initiative, there is no peer-reviewed analytic study evaluating the influences on recent trends in child migration. In particular, any hypothesized effects of DACA must be inter-

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[17] Hanson & Spilimbergo, *supra* note 6; Bean et al., *supra* note 1.

preted in the context of other border enforcement policies that create opportunities and perceptions of opportunities for deferred removal for child migrants. The Trafficking Victims Protection Reauthorization Act of 2008 is the recent policy most directly related to the differential treatment of the Central American child population that has contributed the largest numbers to the recent increases in unauthorized migration by children. The recent surge in apprehensions of unaccompanied children seeking entry post-DACA leads, at minimum, to the conclusion that there is no evidence that DACA policy has contributed to a decrease in unauthorized immigration. One of the stated purposes of the policy has been to redirect the enforcement activities of the Department of Homeland Security to higher priority activities. But just the reverse has occurred. While DACA has not been shown to be the principal cause of the surge, it is reasonable to hypothesize that it has contributed to a climate of expectations among persons contemplating an unauthorized entry that status adjustments may be available to resident unauthorized children.

27. A conservative summary of the status adjustment provisions of IRCA and DACA is that there is no theoretical basis or empirical evidence that such an adjustment contributes to a reduction of future unauthorized entry or population growth except for the bookkeeping adjustment of reclassifying some unauthorized entrants and residents as authorized. It seems virtually certain that the work authorization and deferral of deportation would have a direct effect of decreasing voluntary return and deportation, with the

effect of increasing the size of the resident unauthorized population in Texas and the United States.

28. There is also reasonable theoretical ground for believing that both the demonstration effect to future potential unauthorized entrants of repeated post hoc status adjustments, as well as the expansion of an authorized resident population that may anchor future unauthorized immigration, would have the expected effect of increasing subsequent growth of the unauthorized population. The empirical record is that status adjustment programs have preceded increases rather than decreases of stocks and flows of unauthorized immigration.

VII. Unauthorized Immigrants Receive a Disproportionate Amount of Uncompensated Healthcare

29. There is substantial evidence that unauthorized immigrants have few opportunities for sponsored health care throughout the United States. Rates of private market insurance are low among unauthorized populations. A recent study combining information from the Census Bureau's Survey of Income and Program Participation and American Community Survey estimated that 71% of unauthorized immigrant adults lacked any form of health insurance,[18] a finding that is concordant with more direct survey estimates for regional and local sub-populations.[19]

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[18] Randy Capps et al., Migration Policy Inst., *A Demographic, Socioeconomic, and Health Coverage Profile of Unauthorized Immigrants in the United States* (May 2013).

[19] Dana P. Goldman et al., *Legal Status and Health Insurance Among Immigrants*, 24 HEALTH AFF. 1640 (2005).

30. Unauthorized immigrants do not use healthcare at high rates. Unauthorized immigrants appear to have lower rates of morbidity than U.S. native populations. This is a common finding for immigrant populations because migration is frequently health-selective—that is, people with better health are more likely to join immigration streams. It is also likely that poorer access to care means that unauthorized immigrants are more likely to have undiagnosed conditions, and hence fail to present for treatment.[20]

31. When they do get sick, immigrants are less likely to seek medical care than other populations because of lower rates of health insurance coverage and other barriers to care.[21] The one exception to this pattern of lower health care use is that unauthorized immigrants use a higher volume of services than most other populations for labor and delivery.[22]

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[20] Silvia Helena Barcellos et al., *Undiagnosed Disease, Especially Diabetes, Casts Doubt on Some of the Reported Health "Advantage" of Recent Mexican Immigrants*, 31 HEALTH AFF. 2727 (2012); Wassim Tarraf et al., *Emergency Department Service Use Among Immigrant and Non-Immigrant Groups in the United States*, 16 J. IMMIGRANT & MINORITY HEALTH 595 (2014).

[21] Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Immigrants*, 3 J. IMMIGRANT HEALTH 151 (2001); Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, 19 HEALTH AFF. 51 (2000); Kathryn Derose et al., *Immigrants and Health Care: Sources of Vulnerability*, 26 HEALTH AFF. 1258 (2007).

[22] Berk et al., *supra* note 20; C. Annette DuBard & Mark W. Massing, *Trends in Emergency Medicaid Expenditures for Recent and Undocumented Immigrants*, 297 J. AM. MED. ASS'N 1085 (2007).

32. When they do use healthcare, unauthorized immigrants disproportionally use uncompensated care. Using an application of the residual method described above to create estimates of unauthorized immigrant populations to data from the Medical Expenditure Panel Survey, Professor Stimpson and colleagues estimated that between 2000 and 2009, unauthorized immigrants were more than twice as likely as U.S. natives to use uncompensated care, and had higher rates of use of uncompensated care than all other immigrant status groups.[23]

Table 3: Health Care Spending by Nativity And Legal Status Of Respondents To The Medical Expenditure Panel Survey, 2000-09

	Status			
	Unauthorized Immigrant	Legal resident	Naturalized citizen	US native
PERCENT OF POPULATION HAVING:				
Any health care expenses	60	72	83	87
Any uncompensated care	5.9	4.7	2.3	2.5
EXPENDITURES				
Average annual (millions of 2009 $)	15,370	28,473	52,621	1,025,229
Percent of US expenditures	1.4	2.6	4.7	91.4

Source: Stimpson et al., *Unauthorized Immigrants Spend Less*, *supra* note 23 (Ex. 1).

33. Health care providers in states, including Texas, that have a disproportionate burden of resident unauthorized populations, have a disproportionate burden of providing uncompensated care. Estimates from the

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[23] Jim P. Stimpson et al., *Unauthorized Immigrants Spend Less Than Other Immigrants and US Natives on Health Care*, 32 HEALTH AFF. 1313 (2013); Jim P. Stimpson et al., *ED Visits and Spending by Unauthorized Immigrants Compared With Legal Immigrants and US Natives*, 32 AM J. EMERGENCY MED. 679 (2014).

residual method presented in Table 1 above are that the unauthorized immigrant population in Texas is between 1.65 and 1.83 million as of 2012. The Texas Health and Human Services Commission (HHSC) has estimated that the State's public hospital district facilities incurred approximately $596.8 million in uncompensated care for unauthorized immigrants in FY 2006 and $716.8 million in FY 2008.[24]

34. These unauthorized immigrants disproportionally reside in a few jurisdictions, including the Harris County Health District and Dallas County Health District. As a result, these jurisdictions have a disproportionate burden of uncompensated care. For example, out of the estimated $596.8 million in uncompensated care provided to unauthorized immigrants by public hospital facilities in FY 2006, approximately $215.4 million was incurred at Harris County facilities and $134.7 million was incurred at Dallas County facilities.[25] Out of the estimated $716.8 million in uncompensated care provided to unauthorized immigrants by public hospital facilities in FY 2008, approximately $239.7 million was incurred at Harris County facilities and $175.5 million was incurred at Dallas County facilities.[26]

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[24] Tex. Health & Human Servs. Comm'n, *Report to the United States Congress on Services and Benefits Provided to Undocumented Immigrants* at 4-10 (2008) ("HHSC 2008 Report"); Tex. Health & Human Servs. Comm'n, *Report on Services and Benefits Provided to Undocumented Immigrants* at 6-12 (2010) ("HHSC 2010 Report")

[25] HHSC 2008 Report, *supra* note 24, at 6-10.

[26] HHSC 2010 Report, *supra* note 24, at 8-12.

35. Unauthorized immigrants residing in Texas also receive healthcare services and benefits from several public programs through the State's HHSC. For example, unauthorized immigrants are eligible for Texas Emergency Medicaid, which provides Medicaid coverage limited to emergency medical conditions, generally defined to mean conditions that, in the absence of immediate medical attention, could reasonably be expected to place the patient's health in serious jeopardy or cause serious impairment or dysfunction to the patient's bodily functions or organs.[27] According to reports compiled by HHSC, the total estimated cost to the State for the provision of Emergency Medicaid services to unauthorized immigrants residing in Texas was approximately $80 million in FY 2007, $62 million in FY 2009, and $71 million in FY 2011.[28]

36. Unauthorized immigrants also may be entitled to receive Texas Children's Health Insurance Program (CHIP) Perinatal Coverage, which provides prenatal care for the unborn children of women whose income is up to 200% federal poverty level and who do not qualify for Medicaid. This coverage includes prenatal visits, labor with delivery, and upon the birth of the child, any regular checkups, vaccines, and medicines ordered by

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[27] Tex. Health & Human Servs. Comm'n, Texas Works Handbook (2014) (glossary), *available at* http://www.dads.state.tx.us/handbooks/TexasWorks/glossary/index.htm#emc.

[28] HHSC 2008 Report, *supra* note 24, at 3; HHSC 2010 Report, *supra* note 24, at 4; Tex. Health & Human Servs. Comm'n, *Report on Texas Health and Human Services Commission Services and Benefits Provided to Undocumented Immigrants* at 6 (2013) ("HHSC 2013 Report").

the doctor.[29] HHSC estimates that the total cost to Texas for CHIP Perinatal Coverage to unauthorized immigrants residing in the State was $33 million in FY 2009 and $35 million in FY 2011.[30]

37. In addition, the State's Family Violence Program (FVP) contracts with non-profit agencies to provide essential services to family violence victims, including unauthorized immigrants. The FVP's services include temporary 24-hour shelter, counseling, assistance in obtaining medical care, and emergency transportation.[31] HHSC estimates that the total cost to the State for the provision of direct FVP services to unauthorized immigrants residing in Texas was $1.2 million in FY 2007, $1.3 million in FY 2009, and $1.3 million in FY 2011.[32]

38. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct to the best of my knowledge.

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[29] Tex. Health & Human Servs. Comm'n, CHIP Perinatal (2014), *available at* http://chipmedicaid.org/en/CHIP-Perinatal.

[30] HHSC 2010 Report, *supra* note 24, at 5; HHSC 2013 Report, *supra* note 28, at 8.

[31] Tex. Health & Human Servs. Comm'n, Family Violence Program (2014), *available at* http://www.hhsc.state.tx.us/help/family-violence.shtml.

[32] HHSC 2008 Report, *supra* note 24, at 4; HHSC 2010 Report, *supra* note 24, at 4; HHSC 2013 Report, *supra* note 28, at 7.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of Jan., 2015.

/s/ KARL ESCHBACH
KARL ESCHBACH

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF PATRICK A. FERNAN

I, Patrick A. Fernan, have personal knowledge of the following facts and declare:

1. I am the Administrator of the Wisconsin Department of Transportation ("WisDOT"), Division of Motor Vehicles ("DMV"). WisDOT is an administrative agency within the executive branch of the State of Wisconsin government responsible for providing a broad array of transportation services. The DMV is one of five divisions within WisDOT and is responsible for, among other things, instituting a classified driver license system that meets all federal standards under 49 U.S.C. §§ 30304(e) and 31301 to 31317 and 49 C.F.R. pts. 383 and 384, issuing operator's licenses to Wisconsin residents in accordance with federal and state laws, and issuing identification cards to Wisconsin residents in accordance with state laws.

2. I have held the DMV Administrator position since July 2013. The DMV Administrator position is an appointed position that provides leadership for approximately 770 DMV employees who work at approximately 92 locations throughout Wisconsin. DMV offers in-person, telephone, mail, internet, and third- party services relating to driver licensing, identification cards, vehicle title and registration, emissions testing, consumer protection, fraud prevention, and other related activities. The DMV Administrator directly supervises one Deputy Administrator and three Bureau Directors, along with other staff.

3. Before assuming my role as the DMV Administrator in July 2013, I held the DMV Deputy Administrator position since June 2007. In this position, I was responsible for administering, directing, planning, and coordinating the programs, policies, laws, rules, and activities of the DMV. I assumed the responsibilities and full authority of the then-serving the DMV Administrator in the DMV Administrator's absence.

4. I have held other positions in the DMV since February 2005.

5. In Wisconsin, operator's licenses and identification cards are available to all individuals who meet certain eligibility requirements. These requirements vary by product and are available at www.wisconsindmv.gov.

6. Currently, approximately 4,000,000 individuals hold an unexpired operator's license, and approxi-

mately 400,000 individuals hold an unexpired identification card. Most products the DMV issues are valid for eight years, and, as such, the DMV issues approximately 550,000 renewal products each year. The DMV issues approximately a total of 1,000,000 original and duplicate operator's licenses and identification cards annually, including instruction permits, probationary licenses, original Wisconsin licenses, duplicates and other products in addition to the renewal products.

7. Pursuant to Wis. Stat. § 343.14(2)(intro.), every application for an operator's license or an identification card must contain documentary proof establishing that the applicant is legally present in the United States.

8. Pursuant to Wis. Stat. § 343.14(2)(es)6., an applicant is authorized to submit, and the DMV is authorized to accept, documentary proof that the applicant has approved deferred action status to establish that the applicant is legally present in the United States.

9. On June 15, 2012, the Secretary of the United States Department of Homeland Security issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" to the United States Customs and Border Protection, the United States Citizenship and Immigration Services, and the United States Immigration and Customs Enforce-

ment. This memorandum is available at www.uscis.gov/childhoodarrivals.

10. This memorandum announced a policy known as "Deferred Action for Childhood Arrivals" ("DACA"), which sets forth a number of criteria the memorandum's recipients should consider when deciding whether to exercise prosecutorial discretion to defer removal action against a certain class of individuals who are unlawfully present in the United States.

11. This class comprises individuals who have: (1) arrived in the United States before age sixteen; (2) continuously resided in the United States for at least five years prior to June 15, 2012; (3) are current students, high school graduates, or recipients of a general education development certificate; (4) have not been convicted of a felony, significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security or public safety; and (5) are not above age 30.

12. On October 4, 2012, in response to WisDOT's request, the Attorney General of Wisconsin issued a formal opinion to WisDOT concluding that a notice of deferred action status issued pursuant to the DACA policy constitutes satisfactory proof of legal presence under the predecessor to Wis. Stat. § 343.14(2)(es)6. The formal opinion further concluded that any operator's license or identification card obtained with a notice of deferred action status issued pursuant to the DACA policy would expire two years from the date

when the notice was issued, even if the product would otherwise last for a longer time period.

13. On January 15, 2013, in response to the formal opinion, the DMV created a unique code for operator's licenses and identification cards obtained with a notice of deferred action status issued pursuant to the DACA policy. The DMV determines whether an applicant is legally present in the United States when that applicant indicates on his or her application that they are not a United States citizen but rather a permanent or conditional resident. For all non-United States citizens, the DMW verifies legal presence status with the United States government using the Systematic Alien Verification of Entitlements ("SAVE") system. Each SAVE verification costs the State of Wisconsin $0.50. If the applicant's legal presence status is verified, SAVE provides a match code. There are match codes associated with a variety of legal presence statuses, including the DACA policy.

14. Between January 15, 2013, when the DMV created the unique DACA policy code, and December 12, 2014 (the "Relevant Period"), the DMV issued 5,053 customers providing a notice of deferred action status issued pursuant to the DACA policy a total of 11,860 operator's licenses and identification cards. During the Relevant Period, the DMV issued a total of approximately 2,032,000 operator's licenses and identification cards.

15. Thus, customers obtaining an operator's license or identification card with a notice of deferred action status issued pursuant to the DACA policy account for approximately 0.58% of all customers obtaining an operator's license or identification card during the Relevant Period ("0.58% DACA Percentage").

16. I am aware of President Obama's recent executive action authorizing the lawful presence of certain undocumented immigrants currently in the United States as an expansion of the existing DACA policy ("Expanded DACA Policy"). My understanding is that the Expanded DACA Policy may extend to more than four (4) million people throughout the United States. Based on these estimates, DMV anticipates an increase in operation and administrative costs to support the implementation of the Expanded DACA Policy. DMV's revenues and costs generated pursuant to the current DACA policy are described in greater detail below; however, the revenues and costs discussed below do not include any forecast or other estimated amount that would account for additional revenues and costs incurred pursuant to the Expanded DACA Policy.

17. The DMV's total revenue for issuance of operator's licenses and identification cards in fiscal year 2014 is approximately $27,900,000.

18. The amount of annual revenue for issuance of operator's licenses and identification cards issued to customers providing a notice of deferred action status

issued pursuant to the current DACA policy is approximately $161,820.00. DMV derived this amount by multiplying the total amount of annual revenue for issuance of operator's licenses and identification cards ($27,900,000) by the 0.58% DACA Percentage.

19. The DMV's expenditures on operator's license and identification card programs are projected for fiscal year 2015 to be approximately $33,500,000 ("Annual Expenditures").

20. The total Annual Expenditures for services rendered to customers providing a notice of deferred action status issued pursuant to the current DACA policy is approximately $194,300.00. The DMV derived this amount by multiplying the total amount of DMV Annual Expenditures ($33,500,000) by the 0.58% DACA Percentage.

21. The net annual loss for fiscal year 2015 for operator's license and identification card programs is projected to be approximately $5,600,000.00 ("Net Annual Loss"). The DMV derived this amount by subtracting the total amount of Annual Expenditures ($33,500,000) from the total amount of revenues ($27,900,000).

22. The anticipated amount of Net Annual Loss attributable to the number of operator's licenses and identification cards issued to customers providing a notice of deferred action status issued pursuant to the current DACA policy is approximately $32,480.00. The DMV derived this number by multiplying the total

amount of Net Annual Loss ($5,600,000.00) for fiscal year 2015 by the 0.58% DACA Percentage.

23. In addition to the Annual Expenditures cited above, additional costs associated with the DMV's operator's license and identification card programs include services and support from the four (4) other WisDOT Divisions and the Executive Offices: (1) Division of Transportation System Development; (2) Division of Transportation Investment Management; (3) Division of State Patrol; (4) Division of Business Management; and (5) the Executive Offices, which include the Secretary's Office, Office of Policy, Finance and Information, Office of General Counsel, Office of Public Affairs (collectively, the "Divisions"). These costs include, but are not limited to: (1) salary and fringe benefits of certain full-time WisDOT employees working exclusively on DMV operations; (2) salary and fringe benefits of certain fulltime WisDOT employees working on DMV operations as a part of their work duties; (3) warehouse and other storage costs; and (4) freight costs. These costs are collectively referred to herein as "Identifiable Division Costs".

24. The Identifiable Division Costs attributable to the operator's license and identification card programs totaled approximately $3,410,516.00 for the fiscal year 2014.

25. The Identifiable Division Costs attributable to customers providing a notice of deferred action status issued pursuant to the current DACA policy is approx-

imately $9,890.00. The DMV derived this number by multiplying the total amount of Identifiable Division Costs by the .58% DACA Percentage.

26. WisDOT annually spends approximately $2,718,939.00 for the operation of its approximately 92 service centers throughout Wisconsin and central office operations in costs attributable to operator's license and identification card programs ("Facility Costs"). The Facility Costs include costs for rent, maintenance, telephone and cable services.

27. The Facility Costs attributable to servicing customers that provide a notice of deferred action status issued pursuant to the current DACA policy is approximately $15,770.00. The DMV derived this number by multiplying the total amount of Facility Costs by the .58% DACA Percentage.

28. WisDOT annually spends an indeterminate amount on additional DMV operational costs attributable to operator's license and identification card programs, including, but not limited to: (1) human resource services; (2) training of DMV staff in general programming; (3) training of DMV staff in specialized areas (such as a new process for the Expanded DACA Policy or emergency medical training); (4) employee assistance program; (5) affirmative action/equal opportunity employment programs; (6) payroll and benefit coordination; (7) worker's compensation and risk management; (8) fiscal services; (9) procurement services and support; forms and publication costs; (10) office

space costs for other DMV staff and administrators within WisDOT's central office located in Madison, Wisconsin; (11) IT operation costs and equipment costs that support all of DMV's functions, programs and services, including those at its approximately 92 service centers and online; (12) supply costs, such as office supplies, janitorial supplies, furniture and other fixtures; and (13) all other costs incurred by WisDOT relating to the operation and administration of the DMV within WisDOT that are not Identifiable Division Costs and not otherwise reflected herein.

29. In sum, total annual net loss to the DMV attributable to operator's license and identification card programs, and that is attributable to customers providing a notice of deferred action status issued pursuant to the current DACA policy is approximately $58,140.00 ("Annual Total Loss Amount").

30. The DMV derived the Annual Total Loss Amount by adding: (1) the Annual Net Loss attributable to the DACA policy; (2) Identifiable Division Costs attributable to the DACA Policy; and (3) the Facility Costs attributable to the DACA policy.

31. The Annual Total Loss Amount does not include the indeterminate costs set forth in Paragraph 28 above.

32. The Annual Total Loss Amount does not include any anticipated, additional costs resulting from the Expanded DACA Policy. Any additional costs resulting from an Expanded DACA Policy are indetermina-

ble at this time; however, upon any DMV or WisDOT action pursuant to the Expanded DACA Policy, WisDOT will incur an additional loss given that the current DACA policy already results in a loss to WisDOT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 23, 2014.

/s/ PATRICK A. FERNAN
PATRICK A. FERNAN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF JEFFREY M. GILL

I, Jeffrey M. Gill, have personal knowledge of the following facts and declare:

1. I am the General Counsel and Deputy Commissioner for the Department of Workforce Development. I provide legal advice and services for the Department, which includes advice on the administration of the state's Unemployment Insurance Program.

2. The Unemployment Insurance Program, administered by the Indiana Department of Workforce Development, is governed by both federal and state law. The program provides unemployment insurance benefit payments, as determined by state law, to eligible workers who lose employment through no fault of their own. Benefit payments are funded entirely through taxes paid by employers in Indiana.

3. An individual who is not a citizen of the United States but is lawfully present in the United States and otherwise qualifies by having employment and losing employment in accordance with the requirements of state law, is eligible to apply for and receive unemployment insurance benefits payments.

4. Deferred action status under the U.S. Department of Homeland Security memorandum dated November 20, 2014, causes an individual covered by such status to be lawfully present in the United States for the purposes of the Indiana state unemployment insurance law. These individuals will work pursuant to a federally issued work authorization.

5. An otherwise eligible applicant, who has deferred action status, will be paid unemployment benefits that are funded entirely through taxes paid by employers in Indiana.

I declare under penalty of pe1jury that the foregoing is true and correct.

Executed on Jan. 5, 2015.

/s/ JEFFREY M. GILL
JEFFREY M. GILL
General Counsel
Indiana Department of Workforce Development

Miami Herald (FL)

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Oct. 1, 1990

Section: LOCAL

FEW IMMIGRANTS USE FAMILY AID PROGRAM

DAVID HANCOCK Herald Staff Writer

Surprisingly few newly legalized immigrants are taking advantage of a program that could help their spouses and children avoid deportation.

Undocumented aliens' fear of the U.S. Immigration and Naturalization Service, confusion over rules and paper work, and language barriers—the same problems that have slowed INS immigration reforms—are keeping newly legalized people from seeking aid for their spouses and children, immigrants rights advocates say.

"People are fearful of becoming identifiable to INS," said Cheryl Little, chief counsel for the Haitian Refugee Center. "After living in the shadows for so long, one becomes inherently suspicious and paranoid. Perhaps overly cautious."

In February, Immigration Commissioner Gene McNary announced a "Family Fairness" policy to deal with undocumented spouses and minor children of the three million people who applied for legal residency in this country under 1986 immigration reforms.

After Congress passed the Immigration Reform and Control Act in 1986, the INS spent millions in advertising and community outreach programs to encourage undocumented aliens to apply for the government's amnesty and agricultural worker programs, both of which offered a chance at legal status here.

The Family Fairness policy announced this year addresses a conflict facing INS in the aftermath of the immigration reform: how could INS give legal standing to a person, but be poised to deport the person's spouse or minor children who were ineligible for legalization but remained illegally in this country?

The Family Fairness program allows spouses and children to obtain "voluntary departure" status, which lets them work here and avoid deportation. The voluntary departure status, however, does not give full legal standing to the family members. They must seek INS permission to make visits outside this country, and must have their status renewed each year.

In the eight months since McNary announced the Family Fairness program, INS received more than 250,000 inquiries about the program—but only 46,821 applications have been received nationwide.

The number received thus far is just a trickle considering that some experts predicted Family Fairness applications might outnumber the original three million applicants in the government's amnesty and agricultural workers programs. Immigrant organizations that work with Mexicans and Haitians—the two larg-

est groups of the 170,000 people who applied for legal status in South Florida—count their Family Fairness applications in the hundreds.

"Some folks aren't applying because they don't like admitting to INS they're here in an undocumented state," said Lisa Levine, head of the South Dade Immigration Association.

Another problem facing spouses is an INS requirement to show proof they've lived in the country since November 1986, when the immigration reform was passed.

In the case of Levine's Mexican farm worker clients, men who received legal status had paycheck stubs, rent receipts and other proof of residency. Many of their wives stayed home with children and have no documents with their names on them.

"It's difficult for people to come up with proof," Levine said.

INS spokesman Rich Kinney said there has been no date set when INS will stop taking the Family Fairness applications.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Feb. __, 2015

ORDER

Upon consideration of Defendants' Emergency Motion to Stay the Court's February 16, 2015 Order Pending Appeal, any memoranda filed in support thereof or opposition thereto, and the entire record herein, it is hereby

ORDERED that Defendants' Motion is GRANTED; and it is

FURTHER ORDERED that the Court's Order of February 16, 2015 [ECF No. 144 & 145] is hereby stayed in its entirety pending resolution of Defendants' appeal.

Signed on Feb. __, 2015.

/s/ _____

The Honorable Andrew S. Hanen
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF KENNETH PALINKAS

My name is Kenneth Palinkas, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the President of the National Citizenship and Immigration Services Council ("NCISC"). I started working for the Immigration and Naturalization Service in 1999. I have been a member of the American Federation of Government Employees (AFGE) since 2000.

2. I have also been a member of the National Citizenship and Immigration Services Council since March 4, 2011, when I was appointed to the position of Eastern Region Vice President that had been vacated. I was subsequently elected to the position of Executive

Vice President of the NCISC August, 2012, and have served as the NCISC's President upon the resignation of the former President February 2013. The NCISC is part of the American Federation of Government Employees and is recognized by the AFL-CIO. NCISC represents 12,000 federal employees at U.S. Citizenship and Immigration Services ("USCIS").

3. The immigration officers and staff who work at USCIS and are represented by the NCISC are hard-working professionals and proud members of the law-enforcement community. They are charged with, among many other things, processing adjustment-of-status applications, managing the E-Verify system, and managing the Systematic Alien Verification for Entitlements ("SAVE") system.

4. USCIS adjudications officers and staff are the Nation's front-line defense for a safe and secure immigration system. They investigate applications, issue requests for evidence ("RFEs"), and conduct interviews. An interview is one of the most important tools in an officer's toolbox because it is one of the most effective ways to detect fraud and to identify national-security threats.

5. USCIS management, however, has undermined immigration officers' abilities to do their jobs. Management has transformed USCIS from an agency that serves and protects national security and the rule of law into one that instead serves undocumented immigrants and their lawyers. Hence the change in titles

for Officers from Adjudications Officers to Immigration Service Officers. Aliens seeking benefits are now referred to as "customers".

6. The so-called Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parental Accountability ("DAPA") programs have further undermined the goals that USCIS officers pursue every day. The agency has been buried in hundreds of thousands of DACA applications since 2012. And USCIS management has taken several steps to ensure that DACA applications receive rubber-stamped approvals rather than thorough investigations.

7. First, USCIS management routes DACA applications to service centers instead of field offices. But USCIS officers in service centers (as opposed to those in field offices) do not interview applicants. Divesting USCIS professionals of their ability to interview applicants seeking immigration benefits through the DACA and DAPA programs (who have already demonstrated a disregard for the laws of the U.S. as they have entered the country illegally) further erodes and inhibits an officer's ability to root out fraud and screen out national security threats. It also promulgates a system that is designed to automatically approve applications rather than adjudicate each application with all the tools necessary to reach a fair and equitable decision.

8. According to the most recent data I have seen, USCIS reports a 99.5% approval rate for all DACA ap-

plications. The approval rate is that high because USCIS leadership has prevented immigration officers from conducting case-by-case investigations of DACA applications. Leadership has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk.

9. While DACA applicants originally were required to pay fees, DHS and USCIS are now exercising their discretion to waive those fees.

10. USCIS has announced that it will create a new service center to process DAPA applications. The new service center will be in Arlington, Virginia, and it will be staffed by approximately 1,000 federal employees. Approximately 700 of them will be USCIS employees, and approximately 300 of them will be federal contractors. As explained above, by routing DAPA applications through service centers instead of field offices, USCIS management has intentionally created an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers. That management decision prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped.

11. USCIS management's approach to DACA and DAPA is consistent with its approach to other immigration programs. For example, a new USCIS computer system to screen applications known as "Transformation" has proven to be a disaster as the agency has spent upwards of $2 billion for a system that would eventually allow an alien—now referred to as a "customer" under current USCIS policy, as I previously stated—to upload their own information via the internet for adjudication purposes. To date, only one form can be accepted into the program that has been in the making for close to 10 years. The system is wasteful; it undermines the role of USCIS adjudicators and immigration officers who are professionally trained to protect the American public; and it invites fraud and abuse.

12. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31st day of Dec., 2014.

/s/ KENNETH PALINKAS
KENNETH PALINKAS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF JOE PETERS

My name is Joe Peters, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

1. I am the Assistant Director of the Texas Department of Public Safety (DPS) Driver License Division. In this capacity, I oversee DPS's issuance of driver licenses and identification cards to residents of the State of Texas.

2. I was appointed to my current position in August 2013. Prior to that, I served as interim Assistant Director beginning in June 2013. From January 2012 to June 2013, I served as Special Assistant to DPS Director Steven McCraw.

3. Pursuant to Section 521.142(a) of the Texas Transportation Code, an individual applying for an original driver license "who is not a citizen of the United States must present to the department [DPS] documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States before the applicant may be issued a driver's license." Section 521.1425(d) of the Transportation Code provides that DPS "may not deny a driver's license to an applicant who provides documentation described by Section 521.142(a) based on the duration of the person's authorized stay in the United States, as indicated by the documentation presented under Section 521.142(a)."

4. If an individual presents documentation issued by the federal government showing that they are authorized to be in the United States (such as an Employment Authorization Document), and otherwise meets eligibility requirements, DPS will issue a limited term driver license to a non-citizen resident of Texas. A license issued to such an applicant is limited to the term of the applicant's lawful presence, which is set by the federal government when it authorizes that individual's presence. In fiscal year 2014 (September 2013 through August 2014), DPS issued 275,874 limited term licenses.

5. For each non-United States citizen resident of Texas who seeks a limited term driver license, DPS verifies the individual's lawful presence status with the

United States government using the Systematic Alien Verification of Entitlements ("SAVE") system. Attached as Exhibit 1 to the declaration is a true and correct copy of the Memorandum of Agreement between the U.S. Department of Homeland Security and the State of Texas governing the use of the SAVE system for the purpose of verifying citizenship and immigration status information of non-citizens applying for driver licenses. The State of Texas currently pays an average of $0.75. per customer for SAVE verification purposes.

6. I am aware of the President's recent executive action authorizing the lawful presence of certain undocumented immigrants currently in the United States. My understanding is that the new deferred action plan may extend to more than 500,000 undocumented individuals residing in the State of Texas. Based on these estimates, DPS anticipates that the Driver License Division will require a substantial increase in operating funds to support the implementation of the President's executive order. This is because if those individuals are determined to be lawfully present in the United States, they will be eligible to receive a limited term driver license.

7. DPS estimates that for each additional 1,750 driver license customers seeking a limited term license, DPS would have to hire 2.03 full time equivalent (FTE) employees to process those issuances. If the DPS customer volume increases by 100,000 individu-

als, DPS estimates a total cost of approximately $16.23 million (or $ 162.39 per license issued). This estimate includes the expenses that DPS would incur to hire and train 124 additional FTEs, purchase additional office equipment and technology to equip the available square footage at driver license offices, and produce the driver licenses. For every 60,000 additional customers above the 100,000 customer threshold, DPS would have to open additional driver license offices or expand current facilities to meet that increase in customer demand.

8. The table below outlines the estimated costs that DPS would incur for employee hiring and training, office space, office equipment and technology, and card production cost, based on an increase in customer volume up to 520,000 people.

Customer Volume Scenario	Additional Employees Required	Additional Office Space Required (Sq/Ft)	Biennial Cost for Additional Employees	Cost for Adding Customer Counters at Existing Offices	Biennial Cost for Facilities & Technology Expansion	Card Production Cost	Biennial Cost to DPS	Additional Cost to DPS per License Applicant
25,000	30.9	0	$3,829,139	$0	$0	$43,000	$3,872,139	$154.89
100,000	123.4	0	$15,316,557	$750,000	$0	$172,000	$16,238,557	$162.39
160,000	197.5	24,000	$24,506,492	N/A	$4,800,000	$275,200	$29,581,692	$184.89
220,000	271.6	48,000	$33,696,426	N/A	$7,800,000	$378,400	$41,874,826	$190.34
340,000	419.7	96,000	$52,076,295	N/A	$13,800,000	$584,800	$66,461,095	$195.47
400,000	493.8	120,000	$61,266,279	N/A	$16,800,000	$688,000	$78,754,279	$196.89
520,000	641.9	168,000	$79,646,098	N/A	$22,800,000	$894,400	$103,340,498	$198.73

The cost per license identified in this table only reflects the costs DPS would incur for processing origi-

nal applications for driver licenses.[1] Standard term licenses issued to most citizens are valid for a period of six years with an allowance to renew online once after an office visit. Therefore, most license holders only have to visit a driver license office once every twelve years. Because limited term licenses are limited to the term of the applicant's lawful presence, it is possible that an individual would have to renew his limited term license four times during the same twelve year span. Every renewal for a limited term license requires an additional in-person visit to a DPS facility, and thus requires additional costs related to employee hiring and training, verification of lawful presence status through the SAVE system, office space, office equipment, and infrastructure. Thus, the estimated costs identified above that DPS would incur would only increase if more limited term licenses are issued.

9. DPS further anticipates that the State's cost of conducting SAVE verifications will rise to the extent that DPS's customer base increases as a result of the President's executive action. This potential cost increase is in addition to the table of costs identified above and would not otherwise be incurred but for the President's executive action.

10. DPS has also observed that its driver license services do not grow on pace with the State's popula-

---

[1] The costs per license identified in the chart do not include costs for card design and additional programming for the Driver License System.

tion growth. This is particularly true in areas like Houston, Dallas-Fort Worth, San Antonio, Austin, El Paso, Midland-Odessa, and the Rio Grande Valley, where the population growth rate exceeds that of less populated counties. Based on the Texas Data Center information, the more populated counties grow by 4-5% each year, while the less populated counties grow by 1-2%.

11. The added customer base that may be created by the President's executive action, assuming an applicant will be able to demonstrate they are authorized to be in the United States, will substantially burden driver license resources without additional funding and support.

12. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of Jan., 2015.

/s/ JOE PETERS
JOE PETERS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF SHERI POLLOCK

I, Sheri G. Pollock, have personal knowledge of the following facts and declare:

1. I am the Deputy Chief Legal Counsel of the Wisconsin Department of Workforce Development. I provide legal advice and services for the Department, which includes advice on the administration of the state's Unemployment Insurance Program.

2. The Unemployment Insurance Program, administered by the Wisconsin Department of Workforce Development, is governed by both federal and state law. The program provides unemployment insurance benefit payments, as determined by state law, to eligible workers who lose employment through no fault of their own. Benefit payments are funded entirely through taxes paid by Wisconsin employers.

3. An individual who is not a citizen of the United States but is lawfully present in the United States and otherwise qualifies by having employment and losing employment in accordance with the requirements of state law, is eligible to apply for and receive unemployment insurance benefit payments.

4. Deferred action status under the U.S. Department of Homeland Security memorandum dated November 20, 2014, causes an individual covered by such status to be lawfully present in the Unites States for the purposes of the Wisconsin state unemployment insurance law. These individuals will work pursuant to a federally issued work authorization.

5. An otherwise eligible applicant, who has deferred action status, will be paid unemployment benefits that are funded entirely through taxes paid by Wisconsin employers.

6. In 2013, DWD paid claims for unemployment benefits, totaling $570,745 to 168 unique claimants who indicated they were non-citizens, working lawfully under a federal work authorization.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 22, 2014.

/s/ SHERI G. POLLOCK
SHERI G. POLLOCK

"President Obama's Executive Overreach on Immigration"

Witnesses: Ronald Rotunda, Doy and Hee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, Dale E. Fowler School of Law; Jay Sekulow, Chief Counsel, American Center for Law and Justice; Thomas H. Dupree Jr., Partner, Gibson, Dunn & Crutcher LLP; Marielena Hincapie, Executive Director, National Immigration Law Center

Location: 2141 Rayburn House Office Building, Washington, D.C.

Time: 1:00 pm America/New_York, Date: Tuesday, December 2nd, 2014

* * * * *

REPRESENTATIVE ROBERT GOODLATTE (R-VA): (Sounds gavel.) Good afternoon. This hearing of the Judiciary Committee will come to order. Without objection, the chair is authorized to declare recesses at—of the committee at any time. We welcome everyone to this morning's hearing on "President Obama's Executive Overreach on Immigration."

And I will begin by recognizing myself for an opening statement, but I also want to point out to the members and to the audience in attendance today you're all welcome to be here, but Rule 11 of the House Rules provides that the chairman of the committee may punish breaches of order and decorum by censure and exclusion from the hearing.

President Obama has just announced one of the biggest constitutional power grabs ever by a president. He has declared unilaterally that, by his own estimation, almost 5 million unlawful immigrants will be free from the legal consequences of their lawless actions.

Not only that, he will, in addition, bestow upon them gifts such as work authorization and other immigration benefits. This, despite the fact that President Obama has stated over 20 times in the past that he doesn't have the constitutional power on his own and has repeatedly stated that I'm not a king.

We'll now ask that the video be rolled.

(Videotaped segment begins.)

PRESIDENT BARACK OBAMA: The notion that I can just suspend deportations through executive order, that's just not the case because there are laws on the books that Congress has passed. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that, for me to simply, through executive order, ignore those congressional mandates would not conform with my appropriate role as president.

I can't solve this problem by myself. We're going to have to have bipartisan support in order to make it happen.

We're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws.

I can't simply ignore laws that are out there. I've got to work to make sure that they are changed.

I know some here wish that I could just bypass Congress and change the law myself. (Applause.) But that's not how democracy works. See, democracy is hard, but it's right. Changing our laws means doing the hard work changing minds and changing votes one by one.

Sometimes when I talk to immigration advocates, you know, they wish I could just bypass Congress and change the law myself. But that's not how democracy works.

I swore an oath to uphold the laws on the books.

Now, I know some people want me to bypass Congress and change the laws on my own. Believe me, the idea of doing things on my own is very tempting. (Laughter.) I promise you. Not just—not just on immigration reform. (Laughter.) But that's not how—that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written.

The problem is is that, you know, I'm the president of the United States. I'm not the emperor of the United States. My job is to execute laws that are passed. And Congress, right now, has not changed what I consider to be a broken immigration system. And what that means is is that we have certain obligations to enforce the laws that are in place even if we think that, in many cases, the results may be tragic.

We are a nation of immigrants, but we're also a nation of laws. So what I've said is we need to fix a broken immi-

gration system. And I've done everything that I can on my own.

What I have been able to do is to make a legal argument that I think is absolutely right, which is that, given the resources we have, we can't do everything that Congress has asked us to do. What we can do is then carve out the DREAM Act folks saying young people who have basically grown up here are Americans that we should welcome. But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option.

(Videotaped segment ends.)

REP. GOODLATTE: As The Washington Post's own fact-checker concluded, quote, "Apparently, he's changed his mind." President Obama admitted last week that "I just took an action to change the law," end quote, and I should add a jeweled crown worthy of King James of England, who precipitated the glorious revolution by dispensing with the laws passed by parliament.

The Constitution is clear. It is Congress' duty to write our nation's laws. And once they are enacted, it is the president's responsibility to enforce them. Article II, Section III of the Constitution requires the president to take care that the laws be faithfully executed.

President Obama wants a special pathway to citizenship for 11 million unlawful immigrants and without any assurance that our nation's immigration laws will be enforced in the future, and he is upset that Congress won't

change America's immigration laws to his liking. Thus he has decided to act unconstitutionally under the guise of prosecutorial discretion.

While law enforcement agencies do have the inherent power to exercise prosecutorial discretion, the authority as to whether to enforce or not enforce the law against particular individuals, this power must be judiciously used.

Clinton administration INS commissioner, Doris Meissner, told her agency that prosecutorial discretion is a powerful tool that must be used responsibly and that exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability.

It is not an invitation to violate or ignore the law. Even President Obama's Department of Homeland Security Secretary Jeh Johnson has admitted to the committee that there are limits to the power of prosecutorial discretion and that there comes a point when something amounts to a wholesale abandonment to enforce a dually enacted constitutional law that is beyond simple prosecutorial discretion.

The Obama administration has crossed the line from any justifiable use of identity authority to a clear violation of his constitutional responsibility to faithfully execute the laws.

There is a difference between setting priorities, focusing more resources on those case deemed more serious and

setting enforcement—and setting enforcement-free zones for millions of unlawful aliens.

By boldly proclaiming that there will be no possibility of removal for millions of unlawful aliens, President Obama eliminates entirely any deterrent effect our immigration laws have. He states plainly that those laws can be ignored with impunity. Such actions will entice others around the world to come here illegally, just like his Deferred Action for Childhood Arrivals program encouraged tens of thousands of unaccompanied alien minors and families from Central America to make the dangerous trek to the United States.

The president relies on a memo prepared by his Justice Department's office of legal counsel to proclaim that his actions are constitutional, but that very memo finds that, quote, "Immigration officials' discretion in enforcing the laws is not unlimited. Limits on enforcement discretion are both implicit in and fundamental to the Constitution's allocation of governmental powers between the two political branches," end quote.

The memo admits that "The executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences," end quote. And the memo quotes the Supreme Court's Heckler versus Cheney decision in stating that the executive branch cannot, quote, "consciously and expressly adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," end quote.

The memo, in fact, is an indictment of President Obama's actions. The president also mistakenly claims that his actions are nothing new. It is true that previous presidents of both parties have provided immigration relief to groups of aliens, sometimes themselves abusing the power of prosecutorial discretion. However, usually, the actions were based on emergencies in foreign countries, thereby relying upon the broad constitutional power given to a president to conduct foreign affairs.

For example, Chinese students were protected from deportation after the Tiananmen Square massacre in 1989. And Haitian orphans who were in the process of being adopted by U.S. citizens before the devastating Haitian earthquake of 2010 were granted humanitarian parole to come to the U.S.

What about President George H.W. Bush's family fairness policy which the White House cites to justify his power grab? Size and scope matter, and only about 80,000 aliens applied for that program.

As to the White House's claim that it covered more than 1.5 million aliens, The Washington Post's fact-checker concluded that, quote, "The 1.5 million figure is too fishy to be cited by either the White House or the media. Indeed, the 100,000 estimate that the INS gave on the day of the announcement might have been optimistic." The Washington Post assigned the White House claims three Pinocchios.

Without any crisis in a foreign country to justify his actions and in granting deferred action to a totally unprec-

edented number of aliens, President Obama has clearly exceeded his constitutional authority. No president has so abused and misused the power of prosecutorial discretion as has President Obama.

By acting lawlessly and assuming legislative power, the Obama administration is driving full speed ahead to a constitutional crisis, tilting the scales of our three-branch government in his favor and threatening to unravel our system of checks and balances.

President Obama has entered the realm of rewriting the laws when he can't convince Congress to change them to match his personal tastes.

As law professor David Rubenstein has written, the more broadly or generally a systematic policy applies, the more it takes on the hue of law. Rather than working constructively with the new men and women Americans elected to represent them in Congress, the president is making his relationship with Congress increasingly toxic by unconstitutionally acting on his own.

Tragically, President Obama's short-sighted actions have further set back congressional efforts to enact legislation to reform our broken immigration system. I look forward to today's hearing and the testimony of our eminent witnesses.

And now I am pleased to yield to the gentleman from Michigan, the ranking member of the committee, Mr. Conyers, for his opening statement.

REPRESENTATIVE JOHN CONYERS (D-MI): Thank you. Ladies and gentlemen—

AUDIENCE MEMBER: (Off mic.)

REP. GOODLATTE: (Sounds gavel.) Presently, we do not have order in the hearing room. Members of the audience must behave in an orderly fashion or else they will be removed from the hearing room. The Capitol Police will remove the disruptive members from the audience immediately.

AUDIENCE MEMBER: (Off mic.)

REP. GOODLATTE: The Capitol Police will remove the members of the audience from the hearing room.

* * * * *

Supreme Court, U.S.
FILED
MAR 1 - 2016
OFFICE OF THE CLERK

No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX
(VOLUME 2)

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 20, 2015
CERTIORARI GRANTED: JAN. 19, 2016

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

[Oct. 09 2014]

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

Thank you for your August 29, 2014 letter to Secretary Johnson requesting information about the Deferred Action for Childhood Arrivals program implemented by U.S. Citizenship and Immigration Services. I was asked to respond to you directly.

I appreciate the opportunity to respond to your request for data and your questions regarding the program. In Enclosure 1, to the extent possible in light of limitations on data availability as described therein, you will find detailed responses to your questions.

Thank you again for your letter and your interest in this important matter. A separate, identical response will be sent to Chairman Goodlatte, who cosigned your letter. Should you wish to discuss this further, please do not hesitate to contact me.

Respectfuliy,

/s/ LEÓN RODRIGUEZ
LEÓN RODRIGUEZ
Director

Enclosures

Enclosure 1

Department of Homeland Security Responses to Chairman Goodlatte and Senator Grassley Regarding the Deferred Action for Childhood Arrivals (DACA) Program

1) **Data**

a. **How many DACA applications have been approved to date?**

From August 15, 2012, through July 31, 2014, USCIS approved 591,555 requests for DACA (Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*), including 591,362 initial requests and 193 requests for renewal.

b. **How many DACA applications have been denied to date?**

From August 15, 2012, through July 31, 2014, USCIS denied 26,130 requests for DACA, including 26,128 initial requests and 2 requests for renewal.

c. **How many DACA applications have been rejected to date? Please explain the various reasons why applications are rejected.**

Beginning August 15, 2012, requests for deferred action under the DACA program have been filed with the USCIS Lockbox facility. From August 15, 2012, through August 31, 2014, USCIS rejected 42,906 re-

quests for DACA (Form I-821D). The top 4 rejection reasons are as follows:

- Using an expired version of the Form I-821D
- Failure to provide a valid signature
- Failure to file the Form I-765, *Application for Employment Authorization*, failure to provide the correct fee associated with that form, or filing an incomplete Form I-765 with the Form I-821D
- Filing while under the age of 15

d. How many times, to date, has DACA status been terminated? Please list the specific reasons for each termination.

DACA does not confer any lawful immigration status. Deferred action, for any reason, is an exercise of prosecutorial discretion to defer removal action against an individual for a certain period of time. USCIS guidance provides that DACA can be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion. Some examples of reasons to terminate include, but are not limited to: approval in error, fraud, conviction of a disqualifying offense, and posing a threat to national security or public safety.

Generally, USCIS will issue a Notice of Intent to Terminate DACA before issuing a Termination Notice. However, DACA terminates automatically as of the date that U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) issue a Notice to Appear (NTA) for removal proceedings. USCIS notifies DACA recipients of the automatic termination by issuing a Notice of Action informing the individual that his or her DACA is terminated as of the date the NTA was issued. DACA also terminates automatically as of the date of departure if an individual travels outside of the United States (on or after August 15, 2012) without advance parole.

As of August 31, 2014, USCIS has terminated 113[1] DACA cases based on the following reasons:

---

[1] Based upon its records, USCIS initially determined that 147 DACA cases had been terminated. (The number 147 was also shared in Director Rodriguez's July 29, 2014 testimony before the House Judiciary Committee). USCIS has subsequently determined the number of 147 was inaccurate because USCIS had recorded 34 of these cases as "terminations" in error within USCIS systems, leaving a total of 113 terminations. Of the 34 cases, 10 cases were approved, 11 acquired lawful immigration status through other means, and 13 were denied.

- Issuance of an NTA by U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP)—68 cases
- DUI conviction—11 cases
- USCIS error (e.g., upon further review, USCIS determined the requestor did not satisfy all DACA guidelines at the time of filing)—11 cases
- Felony conviction—5 cases
- Acquired lawful status—5 cases
- ICE enforcement priority (not including issuance of an NTA or deportation after DACA approval)—4 cases
- Drug-related conviction—3 cases
- Significant misdemeanor conviction (other than DUI)—2 cases
- Deportation after DACA approval—1 case
- International travel without advance parole—1 case
- Aggravated assault conviction—1 case
- Gang membership/public safety—1 case

e. **Of the total number of DACA terminations, how many were terminated on the grounds that the applicant was a member of a criminal alien gang (such as MS-13) or participated in the activities of a criminal alien gang?**

As of August 31, 2014, one case has been terminated on the grounds that the DACA recipient was a member of a criminal street gang. A favorable exercise of discretion would not be extended to a member of a criminal street gang.

f. **Of the total number of DACA terminations, how many were terminated on criminal activity grounds? Please break these out as to felonies, significant misdemeanors and other misdemeanors.**

USCIS has terminated DACA cases according to the following criminal grounds:

- 11 cases were terminated due to DUI convictions (significant misdemeanor)
- 2 were terminated due to other significant misdemeanor convictions
- 3 cases were terminated due to disqualifying drug-related convictions (felony)
- 1 case was terminated due to an aggravated assault conviction (felony)

- 5 cases were terminated due to other felony convictions

g. **Of the total number of DACA terminations, how many of those individuals remain in the United States? What is their status? How many have been removed?**

Pursuant to an ICE ERO review completed on September 17, 2014 of a USCIS-provided list of 113 alien file numbers reflecting DACA terminations:

- 21 of these aliens were removed in FY13 and FY14YTD.
- 92 aliens remain in the United States.
  - 56 are currently non-detained pending a final order of removal.
  - 7 are currently non-detained with a final order of removal.
  - 3 are currently detained and are all pending a final order of removal.
  - 21 were identified by USCIS as a DACA termination but to date, ICE systems do not reflect any subsequent action taken.
  - 5 acquired lawful status

h. How many DACA recipients have applied for advance parole?

As of July 31, 2014, DHS has received 6,458 advance parole applications (Form I-131, *Application for Travel Document*) submitted by DACA recipients.

i. How many DACA recipients have received advance parole?

As of July 31, 2014, DHS has approved 4,000 advance parole applications submitted by DACA recipients.

j. How many DACA recipients have been denied advance parole?

As of July 31, 2014, DHS has denied 566 advance parole applications submitted by DACA recipients.

k. For each advance parole approval, what purposes has advance parole been approved for DACA recipients and how many grants were based on each purpose?

DHS does not track this information. However, advance parole may be granted to DACA recipients if they demonstrate that travel abroad will be for the following:

- Educational purposes;
- Employment purposes; or
- Humanitarian purposes.

l. **How many DACA recipients who have received advance parole subsequently applied for lawful permanent resident (LPR) status? Of the number who have applied for LPR, how many have received such status?**

DHS does not track this information for DACA recipients.

m. **How many DACA recipients have no legal status because of a visa overstay?**

DHS does not track this information.

n. **How many individuals who have had their status terminated in SEVIS have been granted DACA? For each, what was the reason for their terminated student visa status? What process do adjudicators follow when an applicant's status is terminated?**

DHS does not track this information.

o. **Please provide a chart that breaks down the number of DACA recipients according to country of origin.**

The total number of individuals approved for DACA as of July 31, 2014, is 591,362.[2] Enclosure 2 provides a breakdown by country of birth.

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[2] Please note that this number is lower than the 591,555 *total* approved DACA requests stated in response to Question 1)a. above because that response also incorporated renewal requests from 193

p. **How many DACA recipients are currently enrolled in public school? Private school? Elementary school? Junior high or middle school? High school? An alternative program? Home schooled?**

USCIS does not track this information.

q. **How many DACA recipients have been denied employment authorization?**

As of July 31, 2014, USCIS has denied 635 applications for employment authorization (Form 1-765), submitted based on DACA eligibility category (c)(33).

2) **What immigration benefit categories are currently being adjudicated by USCIS adjudicators who will be responsible for adjudicating DACA renewals?**

USCIS uses and shifts its resources as needed to maintain processing times and avoid backlogs to the extent possible. As USCIS has been hiring and training additional adjudicators to meet workload demands, some will be initially assigned to adjudicate DACA requests. Other immigration services officers have been added from the team located at the Nebraska Service Center that adjudicates Form I-90, *Application to Replace Permanent Resident Card*, and from the team at

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individuals previously granted DACA. In order to avoid duplicate counting of individual DACA recipients for this question, we subtracted the renewals.

the Texas Service Center that adjudicates Form I-129F, *Petition for Alien Fiancé(e)*, and Form 1-130, *Petition for Alien Relative*.

3) **Please provide the definition of "alternative program" as stated in FAQ 33, and the rationale for expanding the education requirement to include this type of program.**

An alternative school or program addresses the needs of students that typically cannot be met in a regular school program either as (i) a stand-alone elementary or secondary school or (ii) a program adjunct to or within a school. The school or program provides nontraditional education and falls outside of the categories of regular education, special education, or vocational education.

4) **On what date did DHS initially contact the Department of Education about the need for a definition for "alternative program"?**

DHS and the Department of Education have been partnering together since 2012 on the development of the DHS education guidelines related to the DACA program, including the understanding of the use of the term "alternative program."

5) **Please provide any communications between DHS and the Department of Education regarding the concept of and definition of "alternative program."**

As noted above, DHS and the Department of Education have had multiple discussions regard-

ing the use of the term "alternative program" in order to reach an agreed-upon definition.

6) **Will English as a Second Language, and other programs for which DACA eligibility exists, include programs that last only one or two weeks or a matter of days?**

There is no minimum length requirement. To be considered "currently in school" under the DACA guidelines, at the time of filing the DACA request an individual must be in:

- a public, private, or charter elementary school, junior high school or middle school, high school, secondary school, alternative program, or homeschool program meeting state requirements;
- an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment, and the individual is working toward such placement; or
- an education program assisting students either in:
    - obtaining a regular high school diploma or its recognized equivalent under state law (including a certifi-

cate of completion, certificate of attendance, or alternate award), or

- passing a GED exam or other state-authorized exam (e.g., HiSet or TASC) in the United States.

7) **What standard will adjudicators be given to assess the alternative, literacy or language programs? Will such programs be required to be certified, which is the case for inclusion in the Student Exchange and Visitor Program?**

Adjudicators will evaluate if a requestor is enrolled in a qualifying alternative program by determining whether or not the program addresses student needs that typically cannot be met in a regular school program either as (i) a stand-alone elementary or secondary school or (ii) a program adjunct to or within a school. Such a school or program provides nontraditional education and falls outside of the categories of regular education, special education, or vocational education.

USCIS adjudicators are instructed that literacy or ESL programs may be acceptable to meet the "currently in school" guideline for DACA, if they are funded in whole or in part by Federal, state, county or municipal grants or are administered by a nonprofit, federally tax exempt organization. If the literacy or ESL program is not publically funded and not administered by a nonprofit, federally tax exempt organization, then the reques-

tor must show that the program is of demonstrated effectiveness. These programs are not required to be certified.

8) **How many DACA applicants with felony criminal convictions, as defined in FAQ 58, have been granted DACA because the "totality of circumstances" waiver ability set out in FAQ 59 has been utilized?**

As of September 11, 2014, DHS has not granted any DACA request from an individual found to have been convicted of a disqualifying offense. No exceptional circumstances have been found to overcome criminal, national security, or public safety grounds for denial.

9) **Will Congress be briefed about the revised standards for filing of advance parole by DACA applicants prior to the revisions being implemented?**

DHS has previously provided information to congressional staff through GovDelivery as well as teleconferences regarding parameters of the DACA renewal program. We will be glad to provide further information regarding any changes to the standards for advance parole filing prior to implementation of such revisions.

10) **Will there be any exceptions to the limitations set out in FAQ 54 for a DACA applicant or recipient to receive advance parole?**

DHS will continue to evaluate the progress of the DACA program and make any necessary changes to the parameters as appropriate.

11) **Please provide a complete list of situations in which a person was granted advance parole for humanitarian purposes.**

DHS does not track this information. However, examples of acceptable humanitarian purposes include travel to obtain medical treatment, attend funeral services for a family member, or visit an ailing relative.

12) **Does USCIS investigate whether a DACA applicant's diploma was awarded by a diploma mill or was otherwise illegitimately earned? If so, explain how.**

USCIS officers are trained to identify educational documents of questionable authenticity, as well as to identify documents issued by suspect institutions. In those circumstances where a USCIS officer recognizes or suspects that a DACA requestor's educational credentials are awarded by a suspect institution or otherwise question their validity, the USCIS officer will take appropriate action. Specifically, where an entity that does not appear to provide the acceptable educational programs described in USCIS's DACA guidelines

or it appears the requestor's credentials were otherwise illegitimately obtained, the immigration services officer will forward the case to a fraud officer to further investigate the validity of the documents or the institution.

13) **How many cases of diploma mills and/or illegitimate school enrollments by DACA applicants, if any, has USCIS discovered? How many were discovered post-adjudication?**

DHS does not track the number of DACA requests that have been submitted with educational credentials from questionable institutions. USCIS evaluates each DACA request on a case-by-case basis to determine whether or not the requestor's educational credentials meet the guidelines.

14) **Is DACA terminated if the recipient is found to have been enrolled at an illegitimate school or provided evidence from a diploma mill?**

If USCIS discovers it approved a DACA request in error because the requestor did not meet the guidelines—including the educational guidelines for initial requests—the agency may issue a Notice of Intent to Terminate DACA. If the requestor's response does not overcome the grounds of concern, the DACA would subsequently be terminated.

15) **In FAQ 21, and during a June 5, 2014, conference call with congressional staff, USCIS has emphasized the fact that the validity of documentary evidence submitted in support of a DACA application is not routinely verified by government officials. Did you approve including FAQ 21, which clearly announces to applicants that documents, facts, and statements are not routinely verified with educational institutions, other government entities, or employers, in the USCIS materials? Why was this included in the FAQs?**

FAQ 21 does not signify that USCIS will not routinely verify documents, facts, or statements with educational institutions. USCIS immigration officers are trained to evaluate evidence submitted to satisfy the DACA guidelines on a case-by-case basis and to identify indicators of fraud. USCIS has the authority to contact educational institutions, government agencies, employers, or other entities in order to verify information where there is an indication of fraud. DACA requestors are cautioned that knowingly misrepresenting or failing to disclose facts in an attempt to receive DACA subjects them to criminal prosecution and possible removal from the United States.

16) **What actions are taken if DHS finds out that a criminal alien gang member has received DACA? Is the individual issued a Notice of Intent to Terminate and then allowed time to rebut the criminal gang affiliation?**

If an egregious public safety concern, such as certain criminal gang activity, arises after a grant of DACA, USCIS will refer the case to ICE and follow the procedures outlined in the November 7, 2011, Notice to Appear memorandum for egregious public safety cases.

If ICE accepts the case, its issuance of the Notice to Appear will result in automatic termination of DACA and the associated employment authorization. If ICE does not accept the case, USCIS will reopen the case on a service motion and either issue a Notice of Intent to Terminate or a Termination Notice, depending on the specific facts of the case.

If a Notice of Intent to Terminate is issued, and the adverse grounds are not overcome, USCIS will subsequently issue a Termination Notice. This will indicate that the DACA and the associated employment authorization are terminated as of the date of the Termination Notice. USCIS will then refer the case to ICE post-adjudication.

17) **Has USCIS ever allowed an applicant or recipient of DACA to renounce their gang member affiliation in order to receive deferred action?**

No. If USCIS discovers evidence that a requestor is or has been affiliated with a gang, USCIS will evaluate the case based on the totality of evidence available to determine whether the individual poses a threat to public safety. USCIS may conduct a field interview with a suspected gang member or former gang member in an attempt to gather additional information. However, if the information available to USCIS (through background checks, ICE Homeland Security Investigations, and local police) indicates that a DACA requestor is or has been affiliated with a gang, the requestor would have to provide compelling evidence to the contrary. The requestor would also have to show that he or she does not pose a threat to public safety. Simply renouncing gang affiliation would not be sufficient to overcome public safety concerns.

18) **Please explain the interagency cooperation between USCIS and Immigration and Customs Enforcement (ICE) when a DACA recipient has DACA terminated or has committed actions making the individuals eligible for termination.**

ICE generally issues a Notice to Appear if it identifies that a DACA recipient has been convicted of a disqualifying crime or is otherwise an enforcement priority. The NTA automatically ter-

minates the DACA and the accompanying employment authorization. ICE will notify USCIS of the NTA so that USCIS may update its records. USCIS will also inform the DACA recipient of the automatic termination as of the date that ICE issued the notice.

If USCIS identifies that a DACA recipient has committed a criminal action that potentially warrants termination of DACA and a NTA has not been issued, USCIS will send the recipient a Notice of Intent to Terminate. After the 33-day period for a response expires, USCIS will review the evidence submitted in response to the Notice of Intent to Terminate, including any response, and determine whether or not to terminate DACA. If DACA and the accompanying employment authorization are terminated, USCIS will notify ICE of the termination.

19) **Please explain the interagency cooperation between USCIS and the Federal Bureau of Investigation when a DACA recipient is the subject of an FBI investigation.**

If USCIS discovers that a DACA requestor is the subject of an FBI investigation, USCIS will contact the FBI record owner to discuss the impact that processing the DACA request may have on the investigation.

The FBI may request that USCIS hold the case in abeyance while the investigation is completed

or indicate that the continued processing of the DACA request would not impede their ongoing investigation. USCIS will take into account all relevant information prior to determining whether an exercise of prosecutorial discretion is warranted.

20) **Does USCIS share information in a DACA application with law enforcement agencies or officials, upon request, even if the application is pending?**

USCIS will share information in a pending DACA request with national security and law enforcement agencies, including ICE and CBP, for authorized law enforcement purposes other than removal, including:

- assistance in the consideration of DACA;
- identifying or preventing fraudulent claims;
- national security purposes; or
- investigating or prosecuting a criminal offense.

USCIS will provide such information in accordance with relevant privacy, confidentiality and other disclosure-related laws, regulations, and policies.

21) **In order to *initially* obtain DACA, an alien must show that he or she is enrolled in "a public, or charter elementary school, a junior high or middle school, high school or secondary school; alternative program, or homeschool program meeting state requirements." Will all DACA *renewal* applicants be required to submit evidence showing that they remain enrolled in, or have actually completed, the educational program in which they stated they were enrolled for the purposes of obtaining the initial DACA grant? If not, why not? If so, how will USCIS verify the enrollment of completion?**

Individuals who initially received DACA will be considered for renewal unless they engaged in certain criminal activity, departed the country without the government's permission, or stopped residing in the United States. DHS recognizes that a variety of circumstances may have led individuals enrolled in school at the time of their initial request to stop attending. DHS has determined that such a circumstance does not, by itself, necessarily merit denying a request to renew DACA.

22) **An alien can have a criminal record and still receive DACA. Please provide a list of all crimes of which DACA recipients have been convicted and how many DACA recipients have been convicted of each of those crimes.**

DHS does not track this information.

23) **What is USCIS's policy regarding DACA termination for an individual who has, subsequent to the DACA grant, been convicted of a felony?**

If a recipient is convicted of a felony after the DACA grant, the DACA will be terminated in one of two ways:

1. If the disqualifying criminal offense is deemed to be an egregious public safety concern, USCIS will refer the case to ICE and follow the procedures outlined in the November 7, 2011, Policy Memorandum 602-0050 Revised Guidance for the Referral of Cases and Issuance of Notices to Appear memorandum for egregious public safety cases.

   If ICE accepts the case, its issuance of the NTA will result in an automatic termination of DACA and employment authorization. If ICE does not accept the case, USCIS will reopen the case on a service motion and either issue a Notice of Intent to Terminate or a Termination Notice, depending on the specific facts of the case.

   If a Notice of Intent to Terminate is issued, the individual has 33 days to respond. If the adverse grounds are not overcome, USCIS will subsequently issue a Termination Notice, indicating that the DACA and the associated employment authorization are terminated as

of the date of the notice. USCIS will then refer the case to ICE post-adjudication.

2. If the disqualifying criminal offense is deemed to be a non-egregious public safety concern, USCIS will reopen the case on a service motion and either issue a Notice of Intent to Terminate or a Termination Notice, depending on the specific facts of the case.

   If a Notice of Intent to Terminate is issued, and the adverse grounds are not overcome, USCIS will subsequently issue a Termination Notice. This will indicate that the DACA and the associated employment authorization are terminated as of the date of the notice. USCIS will then refer the case to ICE post-adjudication.

24) **The current DACA fee is $465.00, but that consists of the normal $380 fee to cover the I-765 Application for Employment Authorization processing and the standard $85.00 biometric fee. What funds are used to cover the processing of the form I-821D Consideration of Deferred Action for Childhood Arrivals?**

Most of USCIS's budgetary resources are derived from fee collections. In managing the agency's operations, USCIS works to ensure revenue collected is sufficient to fund the agency's operations. With respect to DACA, total revenue has been sufficient to fund agency costs.

25) **Please provide a list of each document that has been deemed acceptable for purposes of showing continuous presence, lack of criminal history, illegal presence prior to June 15, 2012, illegal entrance prior to age 16, physical presence in the U.S. as of June 15, 2012, and attainment of the education requirements for DACA.**

Under the Secretary of Homeland Security's June 15, 2012 memorandum, in order to be considered for DACA, individuals must submit evidence, including supporting documents, showing that they:

- were under the age of 31 as of June 15, 2012;
- came to the United States before reaching their 16th birthday;
- have continuously resided in the United States since June 15, 2007, up to the present time;
- were physically present in the United States on June 15, 2012, and at the time of making their requests for consideration of deferred action with USCIS;
- had no lawful status on June 15, 2012;
- are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the

Coast Guard or Armed Forces of the United States; and

- have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

DHS does not track all of the evidence that has been deemed sufficient to meet these guidelines. Examples of documents that individuals may submit (alone or in conjunction with other evidence) to demonstrate that they meet these guidelines include, but are not limited to:

- Passport with admission stamp
- School records from the U.S. schools they have attended showing the name of the school and periods of school attendance and the educational or grade level achieved
- School records (such as transcripts or report cards) from the school that they are currently attending in the United States showing the name of the school and periods of school attendance and the current educational or grade level
- Any Immigration and Naturalization Service or DHS document stating their date of entry (e.g., Form I-862, *Notice to Appear*; Form I-94/I-95/I-94W with authorized stay expiration date)

- Travel records
- Hospital or medical records
- Rent receipts or utility bills
- Employment records (pay stubs, W-2 forms, etc.)
- Official records from a religious entity confirming participation in a religious ceremony
- Copies of money order receipts for money sent in or out of the country
- Birth certificates of children born in the United States
- Military records (Form DD-214 or NGB Form 22)
- Passport entries
- Dated bank transactions
- Automobile license receipts or registration
- Deeds, mortgages, or rental agreement contracts
- Tax receipts
- Insurance policies
- Final order of exclusion, deportation, or removal issued as of June 15, 2012
- A charging document placing individuals into removal proceedings

- U.S. high school diploma, certificate of completion, or other alternate award
- High school equivalency diploma or certificate recognized under state law
- Evidence that the person passed a state-authorized exam, including the GED or other state-authorized exam (for example, HiSet or TASC) in the United States

Additionally, all DACA requestors who have been arrested for, or charged with, any felony or misdemeanor in the United States, or a crime in any other country, must submit evidence of the results of the arrests or charges. A felony is defined as a Federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year. A misdemeanor is defined as a Federal, state, or local criminal offense for which the maximum term of imprisonment authorized is one year or less but greater than five days. If the charges were handled in juvenile court, and the records are from a state with laws prohibiting their disclosure, this evidence is not required.

If a DACA requestor has ever been arrested for any felony or misdemeanor in the United States, or a crime in any other country, and no charges were filed, he or she must submit an original official statement by the arresting agency or a court order confirming that no charges were filed for each arrest.

If a DACA requestor has ever been charged with or convicted of a felony or misdemeanor in the United States, or a crime in any other country, he or she must submit an original or court-certified copy of the complete arrest record and disposition for each incident. Examples include a conviction and sentencing record, dismissal order, or acquittal order.

If a DACA requestor has ever had any arrest or conviction vacated, set aside, sealed, expunged, or otherwise removed from his or her record, the requestor must submit:

- An original or court-certified copy of the court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction; or
- An original statement from the court that no record exists of the arrest or conviction.

If the DACA requestor is unable to provide any of the documentation listed above, the requestor must provide an explanation, including a description of his or her efforts to obtain such evidence.

Enclosure 2

Consideration of Deferred Action for Childhood Arrivals (I-821D) Initial Application Approvals through July 2014	
Country of Birth	**I-821D Approvals**
MEXICO	458,590
EL SALVADOR	21,458
GUATEMALA	14,283
HONDURAS	14,067
PERU	7,603
SOUTH KOREA	7,594
BRAZIL	6,088
COLOMBIA	5,670
ECUADOR	5,408
PHILIPPINES	3,825
ARGENTINA	3,640
JAMAICA	2,738
INDIA	2,711
VENEZUELA	2,538
DOMINICAN REPUBLIC	2,331
TRINIDAD AND TOBAGO	2,155
BOLIVIA	1,717
COSTA RICA	1,707
URUGUAY	1,682
CHILE	1,453
PAKISTAN	1,436
POLAND	1,409
NICARAGUA	1,169

GUYANA	1,085
NIGERIA	1,076
CHINA, PEOPLE'S REPUBLIC OF	857
BELIZE	724
KENYA	702
CANADA	678
INDONESIA	616
BANGLADESH	529
UNITED KINGDOM	500
GHANA	480
MONGOLIA	480
PANAMA	443
PORTUGAL	429
ISRAEL	348
ITALY	325
ST. LUCIA	289
TAIWAN	276
BAHAMAS	273
TURKEY	268
ALBANIA	266
JORDAN	242
THAILAND	217
EGYPT	205
HONG KONG	205
PARAGUAY	202
ARMENIA	201
SAUDI ARABIA	199
SOUTH AFRICA	193
ZAMBIA	190

UKRAINE	186
UNITED ARAB EMIRATES	186
GERMANY	185
LITHUANIA	181
GRENADA	171
MOROCCO	164
MALAYSIA	163
RUSSIA	163
FRANCE	157
SENEGAL	157
GUINEA	153
ST. VINCENT/ GRENADINES	148
GAMBIA	138
CAMEROON	136
LIBERIA	134
ZIMBABWE	133
LEBANON	131
SRI LANKA	131
HAITI	127
JAPAN	123
SURINAME	123
COTE D'IVOIRE	120
ROMANIA	115
SIERRA LEONE	112
SPAIN	111
BARBADOS	104
CZECH REPUBLIC	104
GREECE	96

FIJI	94
DOMINICA	88
HUNGARY	88
MALAWI	85
ANTIGUA-BARBUDA	83
NEPAL	78
IRAN	75
TANZANIA	75
BULGARIA	73
MACEDONIA	69
CAPE VERDE	68
UGANDA	66
ANGOLA	60
VIETNAM	60
KUWAIT	59
NEW ZEALAND	58
UZBEKISTAN	53
SLOVAK REPUBLIC	51
AUSTRALIA	49
NETHERLANDS	48
MALI	47
TONGA	47
CAMBODIA	46
MONTENEGRO	45
YUGOSLAVIA (FORMER)	44
ETHIOPIA	40
NETHERLANDS ANTILLES	40
DEMOCRATIC	36

REPUBLIC OF CONGO	
SINGAPORE	36
TOGO	36
SYRIA	35
ESTONIA	34
YEMEN-SANAA	30
QATAR	29
SWEDEN	29
AUSTRIA	28
ST. KITTS-NEVIS	28
TURKS AND CAICOS ISLANDS	28
BELGIUM	27
SERBIA	27
GEORGIA	25
BRITISH VIRGIN ISLANDS	24
GABON	23
BAHRAIN	22
BOTSWANA	22
IRELAND	22
CONGO	21
SAMOA	21
WESTERN SAMOA	21
USSR (FORMER)	20
LAOS	19
BENIN	18
LATVIA	18
CAYMAN ISLANDS	17

KOSOVO	17
MACAU	15
SWITZERLAND	15
AFGHANISTAN	12
BURKINA FASO	12
MOLDOVA	12
NAMIBIA	12
NIGER	12
NORTH VIETNAM	12
ALGERIA	11
BURUNDI	11
FRENCH GUIANA	11
MONTSERRAT	11
SLOVENIA	11
LIBYA	10
NORWAY	10
OTHER*	222
UNKNOWN OR NOT REPORTED**	839
Grand Total	**591,362**

* **OTHER:** This group includes those countries with fewer than 10 DACA approvals per country.

** **UNKNOWN OR NOT REPORTED:** USCIS has determined that individuals in this group do qualify for DACA based on their nationality even though country of birth is not available.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DONALD M. SNEMIS

I, Donald M. Snemis, hereby declare as follows:

1. I am over the age of 18 and fully competent in all respects to make this Affidavit.

2. I have personal knowledge of the matters herein stated.

3. I am the duly-appointed Commissioner of the Indiana Bureau of Motor Vehicles (BMV) and Indiana Bureau of Motor Vehicles Commission (BMVC).

4. The BMV is an agency of the executive branch of the State of Indiana. The BMV is responsible for administering and enforcing Indiana's motor vehicle laws. *See* Ind. Code § 9-14 *et al.*

5. The BMVC is a body corporate and politic that is separate from the state but that exercises essential

government functions, including the operation of Indiana's one hundred thirty-two (132) license branches. *See* Ind. Code § 9-15 *et al.* The BMVC also serves as the State of Indiana's motor vehicle authority of purposes of the National Voter Registration Act. Ind. Code § 3-7-14-3.

6. For ease of reference, this Affidavit refers to both entities jointly as the "BMV" or the "Indiana BMV."

7. I have served as Commissioner of the Indiana BMV since January 6, 2014.

8. Prior to assuming the role of Commissioner, I practiced law for about twenty-five (25) years. I remain an active member of the Indiana bar.

9. The BMV employs approximately 1,400 people. About 350 work in the BMV's Central Office in Indianapolis, while the remaining 1,050 work in the BMV's branch offices.

10. The BMV is responsible for approving and issuing driver's licenses, permits and identification cards for non-drivers (collectively "credentials") to Indiana residents. *See* Ind. Code §§ 9-24-11; 9-24-16.

11. From 2010 through 2014, the BMV manufactured and delivered approximately 1,550,000 credentials per year.

12. Indiana law requires all applicants for driver's licenses, permits or identification cards to present doc-

umentary evidence to the BMV that the applicant is either a citizen of the United States or lawfully residing in the United States. Ind. Code §§ 9-24-9-2.5; 9-24-16-3.5.

13. Non-citizens who have approved deferred action status from the United States government qualify for credentials. Ind. Code §§ 9-24-9-2.5(9); 9-24-16-3.5(I). The BMV requires that all such transactions be performed in-person at one of the BMV's one-hundred thirty-two (132) license branches.

14. In June of 2012, the United States Secretary of Homeland Security announced that certain classes of non-citizens who arrived in the United States as children could request deferred action ("DACA") status. See: http://www.uscis.gov/childhoodarrivals.

15. There are approximately 5,300 individuals with DACA status who currently hold credentials issued by the Indiana BMV.

16. I am aware of President Barack Obama's recent executive action extending DACA status to more than four (4) million additional undocumented immigrants throughout the United States.

17. The President's "executive amnesty" will place a substantial financial burden upon the Indiana BMV.

18. It has been estimated that there were approximately 85,000 unauthorized immigrants in the State of

Indiana in 2012.[1] Thus, the Indiana BMV may receive upwards of 85,000 new DACA credential applications in 2014 under the expanded program.

19. In order to meet our goals for customer service, the BMV must employ a sufficient number of people, and maintain a sufficient number of license branches, so that transaction times are reasonably short. Thus, the BMV's branch-related costs are tied directly to (a) the number of transactions we anticipate processing and (b) the number of transactions BMV employees can process in a given amount of time.

20. The BMV routinely tracks both its average branch transaction times (by type of transaction) and its average cost per branch transaction. In 2014, the average branch transaction took about two minutes, twenty-one seconds (2:21) and the BMV's overall cost branch transaction cost was $12.85 per transaction.

21. Applications for credentials submitted by individuals with DACA status are among the most complicated and time-consuming transactions handled by BMV branch employees. The average transaction time for DACA credential applications in 2014 was ten minutes, fifty-eight seconds (10:58), about 4.7 times as long as the average transaction. Thus, it is reasonable to estimate that the BMV's average cost for a

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[1] These are the most recent estimates I have been able to locate. See: http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/

DACA credential transaction is about 4.7 times its cost for an average transaction, which results in a cost of about $60.40 per transaction.

22. Additionally, the BMV verifies lawful status of DACA applicants with the Systematic Alien Verification for Entitlements (SAVE) Program administered by the United States Citizenship and Immigration Services (USCIS). See: www.uscis.gov/save. The cost per verification is between $.50 and $1.50 depending upon whether verification is completed with the initial inquiry or requires subsequent levels of inquiry.

23. The Indiana BMV charges applicants under the age of seventy-five $17.50 for a driver's license. Of this amount, $8.25 is distributed to various state accounts, and $9.25 is deposited into the Bureau of Motor Vehicles Commission Fund ("BMVC Fund"), which was established for the purpose of paying the expenses of operating license branches. Ind. Code §§ 9-29-9-2.1; 9-29-14-1. Assuming a cost of about $61 per transaction, The BMV loses about $51.75 on each DACA application for a driver's license. About 69% of all credentials issued by the BMV are driver's licenses. Assuming that the Indiana BMV receives 58,650 new DACA driver's license applications (69% of 85,000 newly qualified applicants), the BMV would incur about $3 million in additional costs.

24. The Indiana BMV charges applicants for learner's permits $9.50. Of this amount, $4.75 is deposited into various state funds and $4.75 is depos-

ited into the BMVC Fund. Ind. Code § 9-29-9-1. Thus, the BMV loses about $56.25 on each DACA application for a learner's permit. About 12% of all credentials issued by the BMV are learner's permits. Assuming that the Indiana BMV receives 10,200 new DACA applications for learner's permits, the BMV would incur about $574,000 in additional costs.

25. Identification cards are generally free to Indiana residents who are U.S. citizens, but the BMV charges DACA applicants $11.50 for an identification card. Of this amount, $4.50 is deposited to various state accounts and $7.00 is deposited into the BMVC Fund. Ind. Code § 9-29-9-15. Thus, the BMV loses about $54 on each DACA application for an identification card. About 19% of all credentials issued by the BMV are identification cards. Assuming that the Indiana receives 16,150 new DACA applications for identification cards, the BMV would incur about $872,000 in additional costs.

26. In addition, extending DACA status to undocumented immigrants residing in Indiana will likely increase the Indiana BMV's burdens related to fraud investigations. A photograph is taken of all new credential applicants, and that photo is routinely processed by the BMV's facial recognition software to determine if the applicant previously obtained an Indiana credential using another identity. When the software generates a likely hit, the BMV's Fraud & Security Enforcement Department ("FSE") investigates the

case to determine if the individual had previously obtained a credential under false pretenses.

27. In 2014 alone, the seven (7) investigators in the BMV's FSE Department conducted about eight hundred fifty (850) investigations resulting from facial recognition software hits. Of that amount, about eighty percent (80%), or six hundred eighty (680) investigations, resulted from situations where an unauthorized immigrant had obtained a credential from the BMV in the past using a false identity, and then later applied for a legitimate credential when he or she earned legal status. In those situations, the BMV routinely suspends the applicant's driving privileges for a period of time and refers the cases to county prosecutors for prosecution. The average investigation takes about eight (8) hours, and the BMV's cost for FSE investigators is about $40 per hour. Thus, the BMV incurs about $320 in costs for each FSE fraud investigation.

28. Some of the suspended individuals seek administrative review of their suspensions under the BMV's administrative appeals system, which is handled by the BMV's Legal Department. The BMV Legal Department handled about thirty-two (32) appeals from fraud suspensions in 2014. The average administrative review takes about 4.5 hours, and the BMV's cost per attorney is about $43 per hour. Thus, the BMV incurs about $193.50 in costs for each appeal.

29. It is clear from the experience of the BMV that if 85,000 unauthorized immigrants suddenly gain DACA status and seek new credentials, a substantial number of new fraud investigations, suspensions and administrative appeals will occur. While it is not possible to predict the number of new investigations, suspensions or appeals with any accuracy, it is clear that the BMV will experience a significant impact from this change in the law.

30. The President's executive order expanding DACA does not include any funding mechanism to offset the additional $4,446,000 in costs that the Indiana BMV estimates may be incurred as a result of "executive amnesty," or any of the costs related to fraud investigations, suspensions or administrative appeals that cannot currently be estimated. All of these costs will be borne by the State of Indiana.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Date: 1-5-2015 /s/ DONALD M. SNEMIS
DONALD M. SNEMIS,
Commissioner
Indiana Bureau of Motor Vehicles
Indiana Bureau of Motor
Vehicles Commission

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF FINIS WELCH, Ph.D.

My name is Finis Welch, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters herein stated.

Qualifications

1. I am Distinguished Professor Emeritus of Economics at Texas A&M University and Professor Emeritus of Economics at University of California, Los Angeles. I am president of Welch Consulting, a firm that provides expert services in economics and statistics to the legal community, as well as general consulting in economics and statistics. I also serve as chair of StataCorp LP.

2. I received training in statistics and economics at the University of Chicago, where I earned a Ph.D. in

Economics in 1966. I have taught at several universities including Texas A&M University, the University of California, Los Angeles, the City University of New York, Yale University, Southern Methodist University, and the University of Chicago. I have served on the research staff of the National Bureau of Economic Research (NBER) and of the Rand Corporation. At NBER I directed the Program on the Distribution of Income, and at Rand I founded and directed the Labor and Population Studies Program. I have also served on the board of a number of peer-reviewed journals, including the *Journal of Labor Economics* and *The American Economic Review.* I have also served on numerous panels and committees, including chairing the United States Commission on Civil Rights' Advisory Committee on the Status of Women and Minorities and serving as a labor economist on the National Research Council's Committee on Demographic and Economic Impacts of Immigration.

3. Among elected honorary positions, I am a Fellow of the Econometric Society, a member of the American Academy for the Advancement of Science, a member of the National Academy of Education, a Fellow of the Society of Labor Economists and a member of the National Academy of Social Insurance. My research is published in a number of leading, peer-reviewed professional economics journals as well as conference volumes. I am past Vice President of the American Economics Association and past President of the Society of Labor Economists.

4. I have been qualified as an expert in statistics and in economics in both Federal and State courts and have testified on numerous occasions in Federal and State courts.

5. Attached to this declaration are true and correct copies of the following documents:

- Appendix 1 includes my curriculum vitae and lists my publications in the last ten years.
- Appendix 2 sets forth the cases in which I have testified in deposition or at trial during the last four years.

Scope of Inquiry

6. I have been retained in this case by the Office of the Attorney General of Texas to examine the potential economic impact on the labor market of the interaction between the Department of Homeland Security Memorandum dated November 20, 2014 ("DHS Memorandum")[1] and the employer mandate provisions in the Affordable Care Act ("ACA").

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[1] The DHS Memorandum regards the exercise of "prosecutorial discretion" for certain undocumented immigrants. The subject of the DHS Memorandum, prepared by Jeh Charles Johnson, Secretary of the U.S. Department of Homeland Security, is "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Indi-

7. My billing rate for this matter is $500 per hour.

Background on Affordable Care Act and the DHS Memorandum

8. It is my understanding that the DHS Memorandum will expand the number of undocumented immigrants who will be eligible to receive an Employment Authorization Document ("EAD") by an estimated 4 million individuals nationwide, but these individuals newly authorized to work will not be eligible for the premium subsidies provided by the ACA.[2]

9. The Congressional Budget Office and the Joint Committee on Taxation in March 2012 estimated the impact of the ACA on nonelderly workers and their families who were projected to receive employment-based coverage in 2016 *in the absence of the ACA*. The resulting estimates are that 64 million of these individuals will be eligible for subsidies in the exchanges under the ACA.[3]

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viduals Who are the Parents of U.S. Citizens or Permanent Residents."

[2] Memorandum Opinion for the Secretary of Homeland Security, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 30 (Nov. 19, 2014); 45 C.F.R. § 152.2(8).

[3] Congressional Budget Office, *CBO and JCT's Estimates of the Effects of the Affordable Care Act on the Number of People Obtaining Employment-Based Health Insurance* at 12-14 (Mar.

10. Beginning with the 2015 plan year, the ACA mandates that employers with 100 or more full-time employees offer health insurance that provides "minimum value" and is "affordable" to their full-time employees. Starting with the 2016 plan year, this mandate expands to employers with 50 or more full-time employees.[4]

11. To my knowledge, "minimum value" requires that health insurance pay at least 60% of the cost of covered services for employees and their children up to age 26. The ACA does not require the employer to pay the entire cost of this coverage, but the mandate to be "affordable" requires the cost to the employee for this coverage be no more than 9.5% of the employee's income.[5]

12. An employer offering coverage that does not provide "minimum value" or is not "affordable" will owe a penalty under the ACA if any of its employees purchases coverage on the insurance exchange *and receives a premium subsidy*. It is my understanding that this penalty is the lesser of a) $2,000 per year per

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2012), *available at* http://www.cbo.gov/sites/default/files/03-15-ACA_and_Insurance_2.pdf.

[4] Cigna, Employer Mandate Fact Sheet at 1 (Dec. 2014), *available at* http://www.cigna.com/assets/docs/about-cigna/informed-on-reform/employer-mandate-factsheet.pdf.

[5] Cigna, Employer Mandate Fact Sheet, *supra*, at 1-2.

employee after the first 30 employees, or b) $3,000 per year per employee receiving a premium subsidy.[6]

13. Because this penalty is not a deductible expense for the employer from federal (and possibly state) income taxes,[7] the before-tax penalty amount, which would be compared to the wage, is even larger.[8]

Interaction of DHS Memorandum and ACA on Labor Market

14. The interaction of the DHS Memorandum and the ACA will impact employment and wages in the labor market.[9]

15. Consider an employer facing this penalty that is considering hiring one of two prospective employees. These two employees are equally productive and are

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[6] Edward A. Morse, *Lifting the Fog: Navigating Penalties in the Affordable Care Act*, 46 CREIGHTON L. REV. 207, 221-22 (2013); Cigna, Employer Mandate Fact Sheet, *supra*, at 1. For the $3,000 penalty to apply, the employer must have less than a minimum of 26.6% of its employees receiving a premium subsidy. This cutoff % rises with the number of employees—to 46.6% for an employer with 100 total employees and to a maximum of 66.6% (the cutoff % equals 2/3 – 20/# employees).

[7] Morse, *supra*, at 223.

[8] For an employer facing a 35% federal corporate income tax rate and the $3,000 penalty, the equivalent annual before-tax amount is at least $4,615.38.

[9] As an example, for the employer in footnote 8, the penalty would increase the relative annual cost of employing a worker 30 hours per week at the federal minimum wage who receives a premium subsidy by more than 40%.

the same in all relevant aspects to this employer, except that applicant A is a U.S. citizen and applicant B has a new EAD issued pursuant to the DHS Memorandum.

16. Assume applicants A and B are relatively low skilled, so that the cost to the employee of the coverage offered by this employer exceeds 9.5% of the wage that would be offered to them. Also assume that this employer expects less than 25% of its employees to obtain a premium subsidy.

17. In this scenario, the employer would expect applicant A to be more expensive to employ than applicant B because of the interaction of the ACA penalties described above and the DHS Memorandum. There is an extra cost of $3,000 per year (plus the tax impact noted above) from hiring applicant A, if applicant A will receive a premium subsidy. In contrast, hiring applicant B entails no extra cost because applicant B is not eligible for a premium subsidy.

18. An employer subject to the ACA penalties described above that is operating to minimize its expected cost of operations will hire applicant B instead of applicant A. Applicant A, therefore, will take longer to find employment and the resulting employment is more likely to occur at a lower wage.

19. Depending on the employee cost of insurance, the incentive to hire applicant B can occur at a range of wage levels, as illustrated in the following two examples.

Example 1

20. In addition to the above facts, suppose that applicants A and B would be paid the federal minimum wage of $7.25 per hour. Assuming 30 hours per week (the definition of full time in the ACA), a monthly employee cost of $89.54 or greater ($7.25 x 130 hours x 9.5%) would make the employer-provided coverage not "affordable" and would make applicant A eligible for the premium subsidy and potentially trigger the extra $3,000 per year cost (plus the tax impact) from hiring applicant A.[10] There is no extra cost from hiring applicant B.

21. As a result, the employer will hire applicant B instead of applicant A if the employer is operating to minimize its expected cost of operations.

Example 2

22. As an alternative, suppose that applicants A and B would be paid $30,000 per year (about twice the federal minimum wage for 40 hours per week).[11] A monthly employee cost for employee and dependent

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[10] At 40 hours per week, the monthly employee cost would have to be no more than $119.38 to be "affordable."

[11] Using 35 hours per week instead of the ACA limit of 30 to define full-time, the U.S. Census Bureau reports that more than 26.4 million persons were employed full-time and full-year in 2013 with annual earnings below $30,000. U.S. Census Bureau, *Current Population Survey, 2014 Annual Social and Economic Supplement* at Table PINC-10, available at http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc10_000.htm.

coverage in excess of $237.50 (9.5% x $30,000/12) would not be "affordable" and would make applicant A eligible for the premium subsidy and potentially trigger the extra $3,000 per year cost (plus the tax impact) from hiring applicant A. Again, there is no extra cost from hiring applicant B.

23. Similar to the previous example, the employer in this example would be expected to hire applicant B instead of applicant A in an effort to minimize costs.

Conclusion

24. The interaction of the DHS Memorandum and the mandate provisions of the ACA gives employers a financial incentive to hire an undocumented immigrant who is newly authorized to work instead of an identically skilled citizen in certain instances.

25. Based on my knowledge and expertise in labor economics, it is my expert opinion that as a result of the interaction between the DHS Memorandum and the ACA, there will be relatively less hiring of U.S. citizens and relatively lower wages on average for those who are hired. The interplay between the DHS Memorandum and the ACA makes some U.S citizens more expensive to hire than equally productive undocumented workers.

26. This result will have adverse consequences for certain U.S. citizens because some employers will find it financially advantageous to hire an undocumented

immigrant who is authorized to work in the U.S. instead of an equally productive U.S. citizen.

27. All of the facts and information contained within this declaration are within my personal knowledge and are true and correct to the best of my knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of Jan., 2015.

/s/ FINIS WELCH
FINIS WELCH

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 744

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION, *et al.*, JONES & LAUGHLIN STEEL CORPORATION, UNITED STATES STEEL COMPANY, and E. J. LAVINO & COMPANY, PETITIONERS

v.

CHARLES SAWYER, RESPONDENT

No. 745

CHARLES SAWYER, PETITIONER

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, RESPONDENTS

BRIEF FOR PLAINTIFF COMPANIES, PETITIONERS IN NO. 744 AND RESPONDENTS IN NO. 745

* * * * *

Following Judge Holtzoff's decision, Mr. Sawyer proceeded to make announcements, on several occasions, which indicated his intention—in the words of Judge Holtzoff—to "supersede its [management's] control of labor relations". He proposed to do this by imposing upon the companies without their consent whatever changes in terms and conditions of employment he saw fit, and by appropriating the companies' funds to put those changes into effect (R. 103). These announcements, if carried out, would have caused irreparable damage.*

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* Affidavits before the Court disclosed that increased production costs which might be anticipated from the threatened wage increases could not be recovered except by increase in the selling prices of the products of the companies over and above prices authorized by the Office of Price Stabilization; that the Director of the Office of Price Stabilization had publicly announced that no such price increase would be granted; that wages constituted only a few of approximately 100 issues involved in the labor dispute; that in the experienced opinion of the officials making the affidavits it was not possible to reach a satisfactory over-all agreement by settling one issue at a time, but that successful collective bargaining depended upon a settlement of all the issues as a "package", so that if Mr. Sawyer were to increase the compensation of the employees without obtaining corresponding concessions from the Union he would permanently impair the bargaining positions of the plaintiffs; and that even if they should regain possession of their properties they would be forced to continue to pay any increased rate of compensation which he might be permitted to establish, and could not reestablish the existing wage scale altered by him without strained labor relations, turmoil, strife and strikes. See, e.g., Stephens affidavit for U. S. Steel (R. 99); Magee and Schlendorf affidavits for

Some of the earlier of these announcements are detailed in the moving affidavits (R. 103). Others were publicly repeated almost down to the moment when this Court acted on the afternoon of Saturday, May 3.

Thus on Friday, April 18, Mr. Sawyer announced that on "Monday or Tuesday of next week." (*i.e.*, April 21 or 22) he would undertake "consideration of an action upon the terms and conditions of employment". (R. 103) On Sunday, April 20, he publicly stated categorically that "there will certainly be some wage increases granted" (R. 103).

On April 22 press reports stated that "associates" of Mr. Sawyer had indicated that "it may be another *day or two* before the Government announces a pay raise for the workers in the seized mills". Faced with these repeated threats, the three plaintiffs (Youngstown, Republic and Bethlehem) which had appeared before Judge Holtzoff on the applications for temporary restraining orders brought on motions for preliminary injunctions (R. 13, 166, 128). They were joined by the other plaintiffs (Jones and Laughlin, Armco, United States Steel and Lavino), each of which had in the meanwhile brought similar actions for declaratory judgment and injunction (R. 134, 143, 144, 153, 80, 88, 167, 184).

Republic (R. 159, 163); Watson affidavit for Youngstown (R. 16); Elliot affidavit for Jones & Laughlin (R. 140); McMath and Bromley affidavits for Bethlehem (R. 123, 130).

These motions were extensively briefed and were argued for two days (Thursday, April 24, and Friday, April 25) before Judge Pine (R. 280-427). United States Steel, although its formal motion (like those of the other plaintiffs) was for a preliminary injunction to oust Mr. Sawyer from control of its plants, on the argument limited its prayer to a request that Mr. Sawyer be restrained from changing wages or working conditions pending final hearing (R. 67). But it coupled this prayer with a proposal for "trial on the merits of this case immediately" in contrast to Mr. Sawyer's counsel's opposition to early trial (R. 411).

At the argument before Judge Pine, counsel for Mr. Sawyer declined to give any assurance that his client would not act to change wages or working conditions even while the case was *sub judice* (R. 365-366). Judge Pine thereupon proceeded to work on his opinion, which was delivered on the late afternoon on Tuesday, April 29 (R. 66).

He held that the seizures were illegal and without authority of law, that irreparable damage would result to the plaintiffs, and that possession should therefore be restored to the plaintiffs (R. 73-76). With regard to United States Steel Company's more limited prayer, he said that he

> "could not consistently issue such an injunction which would contemplate a possible basis for the validity of defendant's acts, in view of my opinion hereinabove expressed * * * ." (R. 76)

He added:

> "If the United States Steel Company wishes to withdraw its verbal amendment and proceed on the basis of its original motion, leave will be granted for that purpose, and the same injunction issued to it as to the other plaintiffs." (R. 76)

This was accordingly done (R. 115, 439).

Immediately upon the announcement of Judge Pine's decision, the Union issued a strike call and its members started to leave the mills. By the next day (April 30) the stoppage was complete.

On April 30, counsel for Mr. Sawyer filed notice of appeal and applied to Judge Pine for a stay of the injunctions pending appeal (R. 77-78). When this was denied (R. 79), they applied on the same day to the Court of Appeals, which, by the narrow margin of 5 to 4, granted a stay effective until this Court acted on a petition for certiorari which Mr. Sawyer's counsel had stated they would file in this Court. The Court of Appeals provided that its stay would continue beyond May 2 only if such petition were filed on that day (R. 442, 444).

On May 1, by the same 5 to 4 vote, the Court of Appeals denied an application by the plaintiffs to insert a condition in the stay designed to prevent Mr. Sawyer from unilaterally altering terms and conditions of employment pending disposition of Mr. Sawyer's contemplated petition for certiorari (R. 444, 446).

On Friday, May 2, plaintiffs petitioned this Court for certiorari (Docket No. 744). Soon afterwards on the same day Mr. Sawyer likewise petitioned for certiorari (Docket No. 745).

In both petitions, in the reply which each party filed to the petition of the other, and in an *amicus* brief filed by the Union, the question was raised as to a stay of the injunction pending decision by this Court. Counsel for Mr. Sawyer insisted upon an unconditional stay which would leave him free to alter wages and working conditions at any moment. Plaintiffs urged that if any stay were granted it should contain a condition to prevent this from happening.

On the morning of Saturday, May 3, 1952, the President declared that, if the steel companies and the Union did not arrive at a settlement of their labor controversy,

> " * * * the government will be prepared on Monday morning [May 5], or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect."

On the afternoon of May 3, this Court granted certiorari in both No. 744 and No. 745, set the case for argument on May 12, and issued a stay of the injunction pending its decision with the direction that Mr. Sawyer should not impose any changes in terms and conditions of employment without the consent of the Union and the companies.

Beginning on Friday afternoon, May 2, and continuing over the week-end, the Union's members started to return to work; and as this brief is written, steel production has returned approximately to normal.

Summary of Argument

This is not a case where the claim can be made that the Executive Branch is compelled to act to meet a sudden and unanticipated national emergency in a situation where no statutory remedy is available. On the contrary, it is action taken for the purpose of settling a labor dispute by executive fiat, inconsistent with, and contrary to, the remedy expressly provided by Congress to meet just such a situation (*infra*, pp. 18-26).

The seizure of plaintiffs' properties and Mr. Sawyer's other action, including his threatened unilateral changes in wages and working conditions, are unlawful and completely without authority under the Constitution and laws of the United States. They are contrary to the traditions of the common law upon which the Constitution was founded. They are not warranted by the Constitution itself,—either in its terms or as construed from the beginning of the Republic until now. They cannot be justified either on the theory of executive responsibility to "take Care that the Laws be faithfully executed," or under the President's power as Commander in Chief, or on any theory of "inherent powers" (*infra*, pp. 27-73).

The seizure, and Mr. Sawyer's threatened action with respect to changing wages and working conditions, have caused and will cause plaintiffs irreparable injury for which there is no adequate remedy at law and for which money damages are not recoverable (*infra*, pp. 74-86).

The preliminary injunctions were providently issued by the District Court. Plaintiffs are entitled to injunctive relief against the seizure, or at the very minimum, to a preliminary injunction against any unilateral changes by Mr. Sawyer in the terms and conditions of employment pending final hearing (*infra*, pp. 86-89).

This is not a suit against the President; and the District Court had jurisdiction to grant the requested injunctions (*infra*, pp. 90-97).

What This Case Does *Not* Involve

This case does not involve the question whether the nation, or our troops in Korea, need uninterrupted steel production. Obviously they do. Counsel for Mr. Sawyer, in the affidavits submitted in opposition below, and in the petition for certiorari in No. 745, emphasized the vital needs of the nation in this respect. Those needs are not of recent origin; nor has Congress failed to provide lawful means for assuring continued production where the national safety so requires. Those means were available and would have been effective at any time down to the moment of the seizure. Those means were available and would have

been effective even at the time the seizure was made. They are available and would be effective now. They will still be available and effective when this Court hands down its decision. Whatever that decision may be, there is no reason why it should in any way affect the production of steel. But the statutory processes have been ignored; and in this fact is found Mr. Sawyer's true intention in seizing plaintiffs' properties. Congress has not provided for compulsory arbitration of labor disputes, and has expressly excluded seizure as a means for dealing with those disputes; yet compulsory arbitration under force of seizure is what Mr. Sawyer now seeks to achieve by imposing new terms and conditions of employment upon all the plaintiffs.

Plaintiffs know as well as Mr. Sawyer the importance of the uninterrupted production of steel. Indeed their future depends upon it. Plaintiffs, like Mr. Sawyer, earnestly desire that no interruption should occur in their operations. They have no intention of discontinuing operations. They stand ready today, as throughout the period of their negotiations with the Union, to bargain collectively with the Union in the manner prescribed by law.

Nor does this case involve—and we believe this Court will not be concerned with—the merits of the recommendations of the Wage Stabilization Board, or the merits of the respective positions of either the companies or the Union.

The issue, in brief, is not whether steel production must be continued, or how an interruption should be avoided. It is not whether the Union is or is not entitled to more wages, or the companies to higher prices. The sole issue which is before this Court—and which transcends all issues between the companies and the Union—is whether Mr. Sawyer may seize private property, impose by administrative fiat his own settlement of a labor dispute, and proceed to confiscate private property to carry out his views of what that settlement should be.

If arbitrary executive action to force a wage increase is lawful today, then arbitrary executive action to force a wage decrease, or longer hours, or anything else, will be equally lawful tomorrow; and the constitutional rights of all citizens—not of these plaintiffs alone—will be gravely endangered.

ARGUMENT

POINT I

Mr. Sawyer's invasion of plaintiffs' rights is an arbitrary action inconsistent with, and directly contrary to, the remedy expressly provided by Congress.

In their memorandum in the District Court, counsel for Mr. Sawyer stated:

> " * * * the sole reason for and object of the Presidential action herein complained of was not, as spokesmen for the steel management have insisted, to settle a labor dispute, but to insure the uninter-

rupted production of steel during this period of national emergency." (Memorandum, p. 1.)*

Obviously a steel strike would have the most serious consequences to the nation. Obviously, too, the Union had called a strike. The significant thing is that Congress long ago provided against the very eventuality with which we are now confronted, and with the most deliberately expressed intention specified what should and should not be done. The asserted authorization for Mr. Sawyer's actions plainly and admittedly refuses to follow the process of Congress and insists upon a wholly inconsistent process.

Whether, therefore, Mr. Sawyer's action is described as action to settle a labor dispute—which it obviously is—or action motivated by a desire to continue the production of steel—which we may certainly admit for present purposes—or both, the *fact* is that his action flies squarely in the face of a Congressional prescription *for this precise kind of an emergency.* And the development of the situation as it existed on April 8 of this year had been months in the making. The situation does not even remotely resemble some overnight catastrophe requiring executive usurpation first and legalization afterward. If, in these present circumstances, executive usurpation is warranted by some law of necessity, then the constitutional right of

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* Page references to this memorandum throughout this brief are to the mimeographed memorandum filed on behalf of Mr. Sawyer in the District Court.

Congress to provide for emergencies is utterly frustrated by an executive procedure which awaits the creation of the emergency and then insists upon disregarding the means which Congress has provided and using instead a means which is fashioned exclusively by the Executive.

A. Congress has provided for this precise case a remedy which has not been followed.

The Labor Management Relations Act of 1947* created careful procedures for avoiding disastrous consequences to the nation's economy while encouraging mutually satisfactory reconciliation of conflicting interests. By Section 206 of that Act, the President is authorized to appoint a Board of Inquiry when a threatened or actual strike or lockout, affecting an entire industry or a substantial part of it, would imperil the national health or safety. Section 207 empowers that Board to conduct hearings to ascertain the facts of the dispute. After receiving the Board's report, the President is authorized by Section 208 to direct the Attorney General to seek an injunction against the strike or lockout. While the injunction is in effect, the Federal Mediation and Conciliation Service, created by Section 202, is to assist the parties to the labor dispute in their efforts to adjust the settlement of their differences. After 60 days, if the dis-

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* 61 Stat. 136, 29 U. S. C. A. §§176-180, *infra*, Appendix A, pp. 5a-8a.

pute remains unsettled, the Board of Inquiry appointed by the President is to report the current position of the parties, the efforts made for settlement, and a statement of the employer's last offer of settlement. This report is to be made available to the public *and is to be followed, within 15 days, by a secret ballot of the employees to ascertain whether they wish to accept this last offer of settlement.* (Section 209.) When the results of this ballot are certified to the Attorney General, or if a settlement has been reached by the parties, the Attorney General must then move the court to discharge its injunction. After the injunction is discharged, *the President is required to submit to Congress his report,* including the findings of the Board of Inquiry, *with his recommendations for appropriate action.* (Section 210.) There is, of course, nothing to prevent him from reporting to Congress, and asking additional legislation, at any earlier date.

Accordingly, Congress left no procedural void in its program for protecting the national interest when imperiled by a threatened strike. It did not leave for the Executive the determination of the course of action to be followed when the procedures detailed in the Act are exhausted without the dispute having been settled.

The inescapable intent of Congress was that, if the dispute was not resolved during the 80-day period in which the injunction was in effect, the President should present the situation to Congress for necessary legislation. The Senate Report states that if the dis-

pute is not terminated during the 80-day period, "the bill provides for the President's laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis." (Sen. Rep. No. 105, 80th Cong., 1st Sess. 15 (1947).)

The fact that subsequent emergency action was specifically left for Congress itself to take is further clearly shown by the statement on the Senate floor of the author of the bill:

> "We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.
>
> "We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose.

> "I have had in mind drafting such a bill, giving power to seize the plants, and other necessary facilities, to seize the unions, their money, and their treasury, and requisition trucks and other equipment; in fact, to do everything that the British did in their general strike of 1926. But while such a bill might be prepared, I should be unwilling to place such a law on the books until we actually face such an emergency, and Congress applies the remedy for the particular emergency only. Eighty days will provide plenty of time within which to consider the possibility of what should be done; and we believe very strongly that there should not be anything in this law which prohibits finally the right to strike." (93 Cong. Rec. 3835-36 (1947).)

At the same time Congress expressed its will against the procedure adopted by Mr. Sawyer. A *proposed amendment which would have provided for governmental seizure in the event of emergency was specifically rejected* by an overwhelming vote. (93 Cong. Rec. 3637-3645 (1947).)

Moreover, Mr. Sawyer's actions, both accomplished and threatened, destroy the plaintiffs' rights to collective bargaining conferred by Congressional legislation.

In the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, Congress made it an obligation of both employer and employee to bargain collectively. Prior to that time, only the employer was under a statutory duty to bargain

collectively and the employer was not given the correlative right to require bargaining on the part of his employees.

The Act, as amended, preserves the employer's duty to bargain, but in Section 8(b)(3) it places a similar duty on the employees' bargaining representative and thus gives the employer the same right to the process and procedures of collective bargaining as is accorded to the employees' representative. In Section 8(d), also added in 1947, collective bargaining is defined as the "performance of the mutual obligation of the employer and representative of the employees."

The Congressional intent to create for both employer and employee correlative duties and rights to bargain collectively is evident throughout the Senate and House Reports.*

This mutual obligation will be enforced by the courts. Indeed, the courts have recognized the statutory right conferred upon the employer and have enforced the duty of a union to bargain collectively by granting an injunction as requested by the National Labor Relations Board. *Penello* v. *International Union, United Mine Workers of America*, 88 F. Supp. 935 (D. D. C. 1950); *Madden* v. *International Union, United Mine Workers of America*, 79 F. Supp. 616 (D.

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* H. R. Rep. No. 245, 80th Cong. 1st Sess. 5, 21 (1947); Sen. Rep. No. 105, 80th Cong. 1st Sess. 22 (1947); H. R. Rep. No. 510, 80th Cong. 1st Sess. 43 (1947).

D. C. 1948). And this Court has held in an analogous situation that the duty imposed on a carrier by the Railway Labor Act to treat with the representatives of his employees is enforceable by injunction in a suit brought by the employees' duly accredited representative. The Court observed:

> "In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that * * * the meeting of employers and employees at the conference table is a powerful aid to industrial peace.
>
> * * * *
>
> "The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." (*Virginia Railway Co.* v. *System Federation*, 300 U. S. 515, 551-552 (1937).)

Thus the asserted authorization on which Mr. Sawyer relies, and the action which he is taking, not only run directly counter to the procedures which Congress has established but, in so doing, deny and destroy the statutory rights of the plaintiffs. Under the Congressional prescription for this kind of emergency, the collective bargaining rights of both parties are preserved and equality of bargaining status is not disturbed by arbitrary intervention in support of one party to the labor dispute. Should collective bargaining finally

fail, specific Congressional action would follow with due regard for the interests of both parties.

In fact, the procedures adopted by the Executive were directly contrary to those contemplated and prescribed by the Act, as amended. The Act provides in effect for a period of 80 days of continued bargaining, unprejudiced by the appointment of a board empowered to issue recommendations or by the issuance of recommendations. The referral of the present dispute to the Wage Stabilization Board, with the request that the Board make recommendations, seriously prejudiced the bargaining, because neither side could afford to make concessions which might establish a new floor for the recommendations which the Board would issue. After the recommendations were issued they caused further bargaining difficulties which Congress had foreseen and had attempted to avoid by providing for a board of inquiry *without* power to make recommendations.

B. There Was and Could Be No Valid Reason For Disregarding the Remedy Provided by Congress and Adopting Instead an Entirely Inconsistent and Unlawful Procedure.

It was asserted in the District Court, and it may be asserted here, that the President is not required by law to set in motion in any given case the procedure prescribed by the Labor Management Relations Act. But it does not follow that by failing to use the procedure provided by Congress the Executive can thereby

create for itself a right to invoke unwarranted emergency procedures altogether contrary both to the Constitution and to the plain intent of Congress.

In the District Court, the chief excuse advanced for not following the procedure laid down by Congress was that during the period from the commencement of negotiations in November 1951 to their breakdown in April 1952 the Union had voluntarily allowed its members to remain at work for more than the 80-day "cooling-off period" prescribed by the Labor Management Relations Act. It is not claimed that this voluntary abstention by the Union operated to bar the Government, on any theory of estoppel, from using the remedies provided by Congress; and during this voluntary abstention period there was of course no resort to the procedures laid down by the Act, including particularly the provision for a secret ballot of the employees to ascertain whether they wished to accept the last offer of settlement made by management.

It has also been suggested that resort, either at the time of the seizure or now, to the remedy provided by Congress might be futile, since it might simply postpone the problem for another 80 days. This is sheer speculation. Among other things, the argument leaves out of account (i) that during the 80 days there might be a settlement, (ii) that the members of the Union by secret ballot under §209 of the Act—an opportunity denied to them under the present procedure—might choose to accept management's last offer,

and (iii) that within the 80 days there would be ample time for Congress to provide the necessary remedies along the lines already mentioned (*supra*, pp. 20-21). The mere claim that the remedy provided by Congress *might* not work is no excuse for disregarding it and resorting instead to entirely extra-legal action.

The assertion was also made below that when the seizure was made on April 8, a strike call was already out and it would have been too late to obtain an injunction under the Act in order to prevent a shutdown. All other considerations apart, this argument overlooks the fact that under the arrangements made before the Wage Stabilization Board the Union had agreed to give, and actually gave, 96 hours notice of its strike call. In at least one previous case (the Longshoremen's strike of August 1948, noted below*) a

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* The emergency machinery of the Labor Management Relations Act has been invoked on at least nine occasions since its passage. In six of these, injunctions were secured by the Attorney General. These cases were:

March 1948, *Carbide & Carbon Chemical Corporation*—Exec. Order No. 9934, 13 Fed. Reg. 1259. Injunction issued. Dispute settled by direct negotiation between the parties with assistance of the Federal Mediation and Conciliation Service.

March 1948, *United Packing House Workers of America (Meat Packers' strike)*—Exec. Order No. 9934A, 13 Fed. Reg. 1375. Board appointed but no injunction issued.

March and June 1948, *United Mine Workers of America (coal strike,—two cases)*—Exec. Orders 9939 and 9970, 13 Fed. Reg. 1579, 3333. Temporary restraining order and in-

four-day period was adequate to set in motion the entire emergency machinery of the Act, down to and including the issuance of an injunction.

When Mr. Sawyer, in justifying his action here, relies on Executive Order 10340 to the exclusion of the remedy provided by Congress, he poses for the Court's

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junction issued. Dispute as to pension fund settled in collateral court proceeding and other issues settled by direct negotiation between the parties.

May 1948, *American Union of Telephone Workers (American Telephone and Telegraph Company)*—Exec. Order No. 9959, 13 Fed. Reg. 2707. Board appointed but no injunction issued.

June 1948, *Shipping strike*—Exec. Order No. 9964, 13 Fed. Reg. 3009. Injunction issued.

August 1948, *Longshoremen's strike*—Exec. Order No. 9987, 13 Fed. Reg. 4779. Injunction issued. This instance illustrates the rapidity with which the emergency machinery can operate. The President appointed a statutory board of inquiry on August 17, 1948. The board held hearings on August 18 and reported back to the President on August 19. An injunction was issued on August 21.

February 1950, *United Mine Workers of America (coal strike)*—Exec. Order No. 10106, 15 Fed. Reg. 649. Temporary restraining order issued five days after the appointment of the board of inquiry, which had reported back to the President on the day the order was issued.

August 1951, *Non-ferrous metal strike*—Exec. Order No. 10283, 16 Fed. Reg. 8873. Injunction issued. Dispute settled by direct negotiation between the parties.

resolution a square conflict between the word of Congress and the will of the Executive. To resolve that conflict, the Constitution, and centuries of struggle against the dominion of executive power, will point the way.

POINT II

The seizure of plaintiffs' properties and Mr. Sawyer's other action, including that threatened with respect to wages and other conditions of employment, are unlawful and unconstitutional.

Mr. Sawyer's seizure and control of plaintiffs' plants and other facilities, including his threatened action with respect to terms and conditions of employment, are based on the claimed authority of Executive Order No. 10340. The Order by its terms purports to be issued under the "Constitution and laws of the United States." In fact, the Order and Mr. Sawyer's action thereunder find support in no constitutional provision or law of the United States.

As is clear from the memorandum filed on Mr. Sawyer's behalf in the District Court, the asserted right to seize and exercise control over the steel industry—including the right to supplant the steel companies in collective bargaining and to change terms of employment—rests solely upon a claimed prerogative or "inherent power" of the President as Chief Executive and as Commander in Chief of the armed forces. These purported rights are claimed to inure to the Executive simply by virtue of his office. Under Mr.

Sawyer's position the President may exercise virtually unlimited powers in any field where he chooses to say that an emergency exists. For, in his counsel's view, the Executive declaration of emergency is non-reviewable and, once the emergency is proclaimed, the Executive action is beyond the control of the Courts.

This position was thus stated by Mr. Sawyer's counsel in the argument before Judge Pine:

"*The Court*: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldridge: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldridge: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldridge: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldridge: That is correct." (R. 371-372)

* * * * *

"*The Court*: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.

Is that what you say?

Mr. Baldridge: That is the way we read Article II of the Constitution." (R. 377)

* * * * *

"It is our position that the President is accountable only to the country, and that the decisions of the President are conclusive." (R. 380)

This concept of unbridled and unchecked executive power is presented in its most extreme posture by the action here challenged. The seizure reflects a complete disregard of the statutory machinery established by Congress, in keeping with its responsibility under the Constitution, for the handling of the labor dispute in the steel industry. Again, in flat disregard of the Congressional mandate guaranteeing an employer the right to bargain collectively with his employees, Mr. Sawyer has announced his intention to increase the wages of plaintiffs' employees and has declined to give any assurance that he would not do this while the case was *sub judice*. In essential analysis, this is an attempt, without any vestige of statutory authority and solely on the assertion of inherent executive power, to

appropriate plaintiffs' funds for payment of wages in whatever amounts Mr. Sawyer may choose to establish.

Before considering the pertinent provisions of the Constitution, and the scope of the powers it confers on the respective branches in our tripartite system of government, it would appear in order to review briefly the English common law background which so strongly affected the form of our government and had so direct a causal connection to the guarantees of liberty established in the Constitution. For this claim of an inherent overriding power in the Executive to act by fiat in disregard of the law is not a new one. It is precisely the claim which was at the root of centuries of bloody struggle to overcome the absolutism of the English Crown. It was precisely the threat against which the Founding Fathers established safeguards by specifically limiting executive power in framing the Constitution of the United States.

A. The Necessary Background—the Successful Struggle Against the Crown Prerogative and its Culmination in the Constitution of the United States.

We have no intention of burdening the Court with an extended account of the continuous controversy in 17th century England over the royal prerogative. This is a story known in detail by the Founding Fathers, known in basic outline by most Americans and well documented elsewhere. See, *e.g.*, Trevelyan, *England Under the Stuarts* (17th Ed. 1938); Davis,

The Early Stuarts 1603-1660 (1937); Corwin, *Liberty Against Government* (1948). But a brief discussion of that controversy, and its effect on the content of the Constitution of the United States, is singularly pertinent here. For here we have a striking example of the maxim that history repeats itself.

The present claim of the Executive to an inherent right to do whatever he considers necessary for what he views as the common good—without consulting the legislature and without any authority under law—is not a new claim. It is precisely that which was made more than three centuries ago by James I of England when he claimed for himself the right to make law by proclamation and asserted that it was treason to maintain that the King was under the law. It is precisely the claim for which Charles I lost his life and James II his throne. Most importantly, it is precisely the claim for which George III lost his American colonies. In short, it was the continued effort of the English Crown to exercise unfettered prerogative that culminated in the War of Independence and the establishment of the United States under the form of government provided in the Constitution.

The controversies over the prerogative of the English King demonstrate two significant propositions which emphasize the restricted scope of the responsibilities conferred upon the President in the United States Constitution.

First, the prerogative of the English Crown, as understood at the time our Constitution was drafted, embodied no such rights of arbitrary control over private property as those now asserted under the Executive Order.

Second, the Founding Fathers—fresh from the successful struggle of the American colonies against the Crown and fully mindful of the long and bitter struggle that had been required to place that Crown under the law—made it clear that, in establishing the office of the Presidency, they were creating a position of far more circumscribed powers than those then attributed to the Crown.*

The development of the citizen's right in English-speaking countries to protection against arbitrary acts of the Executive is summarized in chapter 2 of Corwin's *Liberty against Government* (1948). The story is as old as Magna Carta.

Chapter 39** of Magna Carta says:

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* See, *e.g.*, Corwin, The President: Office and Powers 365 (3d Ed. 1948).

** Chapter 39 of Magna Carta was copied verbatim in some of the early State Constitutions. In *Bank of Columbia* v. *Okely*, 4 Wheat. 234, 242 (1819), this Court held that it was

> "intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private rights and distributive justice."

> "No freeman shall be taken, or imprisoned, or be *disseised* of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor will we send upon him, but by lawful judgment of his peers, or by the law of the land."

At least five other articles in the Great Charter (Nos. 28, 30, 31, 52 and 56) deal with wrongful seizures of private property by the Crown, and give assurances that they will not be repeated and that property unlawfully taken will be restored.

As Professor Corwin points out, these provisions of Magna Carta were absorbed into the principles of the common law. They were well established as a part of that law when Sir John Fortescue, for 18 years Chief Justice of the King's Bench, somewhere around the year 1468 wrote his famous treatise *De Laudibus Legum Angliae*. The whole thesis of that book was to contrast the limited constitutional powers of the British Crown as they existed even as early as the Wars of the Roses, with the arbitrary powers of continental

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And in *Murray's Lessee, et al.* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 276 (1855), interpreting the Fifth Amendment to the Constitution, this Court said:

> "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law."

rulers. In Chapter 9 (and again in Chapter 36) Fortescue points out that the King of England

> "can neither make any alteration, or change in the laws of the realm without the consent of the subject, nor burden them, against their wills, with strange *impositions*, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely and without the hazard of being deprived of them, either by the King or any other."

Centuries later it was to Magna Carta, and to Fortescue, that Coke appealed when he and the other judges of England declared

> " * * * that the King hath no prerogative, but that which the law of the land allows him." (*Case of Proclamations*, 12 Coke's Reports 74, 77 English Reprint 1352, 1354.)

and that

> "The common law has so limited the prerogatives of the King that they shall not take away or prejudice anyone's inheritance." (*i.e.*, anyone's private property.) (2 Inst. 63; 3 Inst. 84.)

And in the *Case of Prohibitions*, 12 Coke's Reports 63, 77 English Reprint 1342, 1343, the Judges laid down that the King could not take upon himself the power to give judgment in any case, since that was a matter for the courts—

> " * * * with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton said, *quod Rex non debet esse sub homine, sed sub Deo et lege.*"

The controversies between the Crown and Parliament came to a head under Charles I in the celebrated *Case of Ship Money* (*The King* v. *John Hampden*), reported in 3 Howell's State Trials 826 (1637). What is particularly interesting about that case in the present connection is that the Crown lawyers based their claims squarely upon the claims of "national emergency," "common defense" and "inherent powers of the Commander in chief."

After proclamations had been made reciting that although England was then at peace there were wars raging on the continent of Europe, that the seas were unsafe, and that England was in danger of losing control of the sea and of invasion, the King required various counties forthwith to provide ships for the common defense. One citizen (John Hampden) resisted. His case was heard in the Exchequer Chamber before all twelve judges of the three common-law courts.

The Solicitor General and Attorney General, appearing for the Crown, put their arguments squarely on the inherent emergency powers of the King as Commander in Chief, and argued that in time of emergency even Magna Carta and statutes must give way to those "inherent powers."

A majority of the judges accepted the King's views. Mr. Justice Crawley, in words surprisingly similar to the contentions advanced on behalf of Mr. Sawyer in the case at bar, said:

> "It doth appear by this record, that the whole kingdom is in danger, both by sea and land, of ruin and destruction, dishonor and oppression, and that the danger is present, imminent and instant, and greater than the king can, without the aid of his subjects, well resist: Whether must the King resort to Parliaments? No. We see the danger is instant and admits of no delay." (3 Howell's State Trials at 1087.)

In the same vein, other judges asserted that any statute which attempted to bind the King's prerogative as Commander in Chief was invalid, that Parliament moved too slowly in emergencies, and that the King was the sole judge of the necessity.*

A minority of judges, headed by Croke, voted against the King. But the aftermath was interesting.

Professor Corwin (The President: Office and Powers 494, fn. 70) says:

> "The classic expression of Stuart theory is Justice Vernon's statement in the Ship Money Case: 'The King *pro bono publico* may charge his subjects for the safety and defense of the kingdom, notwithstanding any act of Parliament, and a statute derogatory from the prerogative doth not bind the king, and the king may dispense with any law in cases of necessity.' *Rex* v. *Hampden*, 3 S. T. 825 (1637)."

In 1640 Mr. Justice Crawley (author of the statement above quoted) and some of his colleagues who had voted for the King were impeached for having

> " * * * traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England; and instead thereof, to introduce an arbitrary and tyrannical government against law * * * " (3 Howell's State Trials 1283).

The judgment in the *Ship Money* case itself was directed by Parliament to be cancelled as being

> " * * * against the laws of the realm, the subject's right of property, and contrary to former resolutions in Parliament and to the Petition of Right"* (3 Howell's State Trials 1261).

In the reign of James II the controversy broke out afresh. The King claimed the power in cases of urgent necessity to dispense with the laws. Finally, when he pushed the matter too far by indicting for seditious libel those who opposed his views, there was a reaction; and in the *Case of the Seven Bishops* (12 Howell's State Trials 183) Mr. Justice Powell declared that the claimed royal prerogative "amounts to an abrogation and utter repeal of all the laws" and that:

> "If this be once allowed of, there will need no parliament; all the legislature will be in the king, which

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* 3 Car. I, c. 1 (1628).

is a thing worth considering." (12 Howell's State Trials 427.)

The culmination was the exile of James II and the passage under his successors of the English Bill of Rights (1 Will. & Mary Sess. 2, c. 2 (1688)), from which many of the provisions of our own Bill of Rights are taken. That document specifically limited the powers of the Crown in the following respects:

"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

"2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal."

Thus, by the start of the 18th century, the English people, after a long and frequently bloody struggle, finally established that the Crown was under the law. It was clear that the seizure of property by the Crown without authority of Parliament was illegal.

In the decades preceding the War of Independence the American colonists were faced with their own struggle against the actions of George III and his ministers. Throughout the struggle, the colonists constantly appealed to their fundamental rights as Englishmen under Magna Carta and the English Bill

of Rights.* In cataloging the grievances of the colonists against the King, the Declaration of Independence states that he "has kept among us, in times of peace, standing Armies without the consent of our legislature" and "has affected to render the military independent of and superior to, the Civil Power." Various attempts of British generals at the beginning of the Revolution to enforce martial rule were denounced by the legislatures of the various colonies as tyrannical and despotic.

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* See, *e.g.*, Resolutions of the First Continental Congress quoted in 2 Tucker on the Constitution 886 et seq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-CV-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

AND

JANE DOE #1, JANE DOE #2 AND JANE DOE #3,
PROPOSED DEFENDANT-INTERVENORS

Jan. 14, 2015

[PROPOSED] DEFENDANT—INTERVENORS' JOINDER IN DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY OF THE ARGUMENTS

The Proposed Defendant-Intervenors adopt and incorporate in full the DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OP-

POSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION as well as Exhibits 1-33 attached thereto (Dkt. No. 38) (the "Defendants' Memorandum") and submit the following supplemental brief to address the unique personal interests of Proposed Defendant-Intervenors Jane Doe #1, Jane Doe #2, and Jane Doe #3 ("Proposed Defendant-Intervenors"), three individual undocumented immigrants who will be directly and dramatically affected by the resolution of the challenged action in this case.

All three Proposed Defendant-Intervenors meet the DAPA requirements and under the Deferred Action Guidance will be eligible for consideration of deferred action. If Plaintiffs' Motion for Preliminary Injunction successfully halts the implementation of DAPA, barring undocumented immigrant parents from the opportunity to apply for deferred action and work authorization, that injunction will directly impair the Proposed Defendant Intervenors' lives, potentially resulting in deportation, separating families, disrupting communities, and preventing access to legal employment opportunities which will directly impact Proposed Defendant Intervenors' ability to support their families and to contribute to the U.S. economy.

When considering whether to grant this extraordinary motion for equitable relief, the Plaintiffs must "clearly carr[y] the burden of persuasion" for each of the elements of a preliminary injunction—irreparable harm, a likelihood of success on the merits, the balance of the equities, and the public interest. *Karaha Bodas Co. v. Perus-*

ahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 363 (5th Cir. 2003). A set forth below, the Proposed Defendant-Intervenors demonstrate that not only have the Plaintiffs failed to satisfy the four requisite preliminary injunction requirements, but it is the Proposed Defendant-Intervenors, not the Plaintiffs, who are the ones deserving of equitable relief.

Further, while the Defendants' Memorandum explains in compelling detail the statutory, Congressional, and Supreme Court case authority for the nation's immigration policies and priorities as well as the Executive's well-recognized discretionary authority to prioritize enforcement resources through grants of deferred action including DAPA, it fails to address the direct impact of DAPA on individuals such as the Prospective Defendant-Intervenors who have lived in the United States and contributed to their communities for many years. By examining the impact of DAPA on the lives of individuals like the Proposed Defendant-Intervenors, it is evident that if the preliminary injunction is granted and implementation of DAPA is halted this will cause irreparable harm to individuals like Proposed Defendant-Intervernors as well as to the greater public interest.

For these reasons, the Proposed Defendant-Intervenors respectfully submit the following Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction.

STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

In addition to the Statement put forth in Defendants' Memorandum (*see* Dkt. 38 at 12-13), Proposed Defendant-Intervenors raise whether they and individuals similarly situated who are considered low enforcement priority undocumented immigrants as parents of U.S. citizens and contributing members of their communities will suffer a greater harm than Plaintiffs if the preliminary injunction is granted. Proposed Defendant-Intervernors also ask this Court to consider whether DAPA's aim of enhancing the Federal Government's capacity to focus its limited resources on threats to national security and public safety while reducing the humanitarian cost of these enforcement efforts is in the public interest.

ARGUMENT

I. AS DEMONSTRATED BY THE LIVES OF THE PROSPECTIVE INTERVENORS, DAPA IS CONSISTENT WITH NATIONAL IMMIGRATION POLICIES AND PRIORITIZATION MANDATES

On November 20, 2014, Defendant Secretary of the Department of Homeland Security ("DHS"), Jeh Johnson, issued a Memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parent of U.S. Citizens or Permanent Residents" ("Deferred Action Guidance"). (Dkt. No. 38, Ex. 7.) In light of DHS's limited resources, a central component in the Deferred Action

Guidance is the establishment of an integrated directive that includes consideration of the deferred removal of low-priority undocumented immigrants on a case-by-case basis (*i.e.*, by granting them "deferred action"). These low-priority undocumented immigrants include parents of U.S. citizens or Lawful Permanent Residents, all of whom have lived in the United States for at least five years and who are determined by the Government not to pose a threat to national security or public safety ("DAPA"). (*See* Dkt. No. 38 at 1.)

The Proposed Defendant-Intervenors are three individuals who satisfy DAPA's requirements and thus are directly affected by Plaintiffs' attempt to halt its implementation. All three Proposed Defendant-Intervenors have been in the United States for over a decade. None of them have a criminal record or pose any threat to the communities they have actively contributed to for years. All three Proposed Defendant-Intervenors are undocumented immigrants who could be separated from their young U.S. citizen children, families, and communities. Finally, all three could benefit from the ability to obtain work authorization and become legal workers.

Jane Doe #2 has lived in the United States for 13 years and is the parent of two U.S. citizens. (Jane Doe #2 Declaration ("Decl."), ¶¶ 1, 3, 6.) Jane Doe #2 takes care of her husband, children, and mother who lives with them and is suffering from Alzheimer's disease. (*Id.*, ¶ 4.) She also volunteers for her daughter's Head Start program, is active within her church, and is currently studying for her GED. (*Id.*, ¶ 4, 5.)

Jane Doe #3 lives in Donna, Texas and is the parent of a two-year-old U.S. citizen. (Jane Doe #3 Decl., ¶¶ 1, 3, 4.) She has lived in the United States for 11 years. (*Id.*, ¶ 1.) In order to support her daughter and herself, Jane Doe #3 sells items at flea markets and also makes and sells food. (*Id.*, ¶ 3.)

Jane Doe #1 has lived in the United States for over 15 years and is the mother of four U.S. citizens. (Jane Doe Decl., ¶¶ 1, 3, 7.) Jane Doe supports her family, including three children who still live at home, by preparing and selling food, and she also does catalog sales. (*Id.*, ¶ 4.) She routinely volunteers at her church and her children's schools. (*Id.*, ¶ 5.)

II. BECAUSE ALL OF THE FACTORS FAVOR THE DEFENDANTINTERVENORS, PLAINTIFFS' PRELIMINARY INJUNCTION MOTION MUST BE DENIED

Proposed Defendant-Intervenors, and millions like them, will be directly affected by this Court's decision to grant or deny Plaintiffs' Motion for a Preliminary Injunction. To justify granting a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that a balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs cannot meet this burden. As evidenced by Defendant-Intervenors themselves, DAPA is entirely consistent with the Executive Branch's discretionary authority to focus limited immigration resources

on threats to national security, border security, and public safety, and to take into account humanitarian aspects of these enforcement efforts. Moreover, it is Proposed Defendant-Intervenors, not Plaintiffs, who would suffer real and irreparable harm if the preliminary injunction were granted and DAPA's implementation was halted. In addition, Plaintiffs' proposed preliminary injunction is not in the public interest because it would undermine DHS's mandate to utilize its limited resources to remove individuals who are real threats to society, rather than those like Proposed Defendant-Intervenors with children, community ties, obligations to help support their families and no criminal record.

A. Proposed Defendant-Intervenors Demonstrate that DAPA is Consistent with National Immigration Enforcement Policies and Priorities, Thus Plaintiffs' Motion Fails on the Merits.

As thoroughly outlined in Defendants' Memorandum, the Executive Branch has a well-recognized discretionary authority over the implementation of national immigration laws, specifically to defer action on enforcement. (Dkt. No. 38 at 44); *see also Reno v. American-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471, 483-84 (1999). The Secretary of DHS is specifically charged with "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), to ensure that DHS's limited resources are expended in pursuit of its highest priorities in national security, border security, and public safety.

Therefore, DHS was well within its right to draft DAPA with two particular purposes in mind: "(1) enhancing DHS's capacity to focus its limited resources on threats to national security, border security, and public safety, and (2) reducing the humanitarian cost of enforcement efforts when doing so is consistent with these priorities." (Dkt. No. 38 at 1.) These purposes may be more fully understood and appreciated when examined with the lives of the individuals who are fundamentally impacted by DAPA—and its threatened elimination under Plaintiffs' motion—in mind. These purposes also form the cornerstone of why Plaintiffs' preliminary injunction motion fails on the merits.

First, national immigration laws support DHS's efforts to protect public safety by prioritizing funds to remove undocumented immigrants with criminal backgrounds, rather than those who have lived in the United States for years and are contributing members of their communities. DHS estimates that while there are approximately 11.3 million undocumented immigrants eligible for removal, the agency only has the resources to remove fewer than 400,000. *Arpaio v. Obama*, No. 14-cv-1966-BAH, slip op. at 4-5 (D.D.C. Dec. 23, 2014); (Dkt. No. 38 at 5.) In light of these limited resources, DAPA is a rational response to Congress's directive to DHS to prioritize "the identification and removal of [immigrants] . . . by the

severity of the crime." DHS Appropriations Act, Pub. L. No. 111-83, 123 Stat 2142, 2149 (2009).[1]

Proposed Defendant-Intervenors are three of the millions of low-priority immigrants whose deferment under DAPA would allow for the DHS's limited resources to be focused on removing individuals who threaten public safety and do not contribute positively to society. All three Proposed Defendant-Intervenors have lived in the United States for over a decade and are currently working to support their families or are getting an education. While studying for her GED, Jane Doe #2 also cares for her husband, her two U.S. citizen children, and her mother who lives with the family and is suffering from Alzheimer's disease. (Jane Doe #2 Decl., ¶ 4.) Jane Doe #1, who has lived in the United States for over 15 years and has four U.S. citizen children, helps support her family by preparing and selling food and doing catalog sales. (Jane Doe #1 Decl., ¶¶ 1, 3, 4, 7.) Jane Doe #3, who is the mother of a two-year-old U.S. citizen, provides for herself and for her young daughter by selling items at flea markets, and also by making and selling food. (Jane Doe #3 Decl., ¶¶ 3, 4.) Prior to this, Jane Doe #3 worked as a waitress at a taco restaurant and took care of others' children in her home. (*Id.*, ¶ 3.) Each Proposed Defendant-Intervenor has provided many years of vital

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[1] DAPA is also consistent with the Immigration and Nationality Act ("INA"), which includes provisions for the removal of recent border-crossers as well as individuals with a criminal background and those who threaten national security. *See* 8 U.S.C.§§ 1225; 1226(c); 1226a.

support to her family and community, and under DAPA each could take full advantage of regulations allowing an immigrant subject to deferred action to seek employment authorization. 8 C.F.R. §274a.12(c)(14).

Proposed Defendant-Intervenors have also contributed to their communities through active participation in church and volunteering. For example, Jane Doe #2 attends church every Sunday and volunteers in church activities. (Jane Doe #2 Decl., ¶ 5.) She also assists in her four-year-old daughter's Head Start program. (*Id.*, ¶ 3.) Similarly, Jane Doe #1 volunteers at her church and participates in fields trips at her children's schools. (Jane Doe #1 Decl., ¶ 5.) Simply put, Proposed Defendant-Intervernors, and those like them, are not individuals who are or who should be a priority for removal from the United States.

Second, the Supreme Court has consistently recognized that humanitarian concerns, such as those emphasized by DAPA, may be pursued by the Executive Branch when enforcing immigration policy. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (recognizing the Federal Government may "decide whether it makes sense to pursue removal at all" because of "immediate human concerns"); *AAADC*, 525 U.S. at 483-84 (recognizing the "regular practice" of granting "deferred action" for "humanitarian reasons"). The Court has acknowledged that "[t]o ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *AAADC*, 525 U.S. at 484.

If Plaintiffs' preliminary injunction motion is granted and DAPA's implementation halted, the theoretical "harsh and unjust outcome" described by the Supreme Court would become Proposed Defendant-Intervenors' reality. *Id.* Without the deferred action offered by DAPA, Proposed Defendants-Intervernors could be separated from their families, and similarly, these families—including children who are U.S. citizens—could lose important caregivers. Efforts to prevent this potential hardship are not new to national immigration policy; in fact, "[t]he legislative history of the [INA] clearly indicates that Congress ... was concerned with the problem of keeping families of United States citizens and immigrants united." *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966). Here, if Plaintiffs' preliminary injunction motion is granted, and implementation of DAPA is halted, there is a real danger that Jane Doe #2 could be separated from her two children, her husband, and her mother with Alzheimer's disease for whom she is the primary caregiver. (Jane Doe #2 Decl. ¶¶ 3, 4.) Similarly, Jane Doe #1 could be removed from her four children, three of whom still live at home. She would also miss out on seeing her married oldest child start a family of his own. (Jane Doe #1 Decl. ¶ 3.). Finally, Jane Doe #3 could be separated from her two-year-old baby girl. (Jane Doe #3 Decl. ¶ 3). These women—and those like them—are the reason why the U.S. Government has recognized the value of implementing immigration policies that, like DAPA, weigh humanitarian concerns.

B. The Irreparable Harm to Proposed Defendant-Intervernors and the Public Interest Establishes that Plaintiffs' Motion for a Preliminary Injunction Must Be Denied.

Granting Plaintiffs' preliminary injunction and halting DAPA's implementation would cause great harm to Proposed Defendant-Intervenors, the millions of others similarly situated, and the public at large. The Supreme Court has dictated that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (citations omitted). In this instance, granting Plaintiffs' preliminary injunction motion would not only place millions like Proposed Defendant-Intervenors in a precarious position, *see supra* Section II.A, but would also threaten public safety by undermining policies intended to enhance DHS's capacity to focus limited resources on removing those individuals who pose a danger to society. If Plaintiffs' preliminary injunction is granted, it is Proposed Defendant-Intervenors who will be irreparably harmed in contrast to the unsubstantiated claim of harm by plaintiffs if the injunction is not granted. As explained in detail in Defendants' Memorandum (*see* Dkt. No. 38 at 49), Plaintiffs' interest are in preventing, at best, a "speculative injury," *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (quotation and alterations omitted), while Proposed Defendant-Intervernors, and the millions similarly situated, would face "a real and immediate threat" of harm if the prelim-

inary injunction motion were granted. *Grant v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003) (quotation omitted). The humanitarian rationale for DAPA discussed in Section II. A similarly supports a finding that halting the implementation of DAPA would irreparably harm individuals like Defendant-Intervenors.

The bottom line is that, if DAPA is enjoined the Proposed Defendant-Intervenors and millions like them will remain subject to deportation at any time. Despite their low priority as candidates for deportation, their lives could be upended. Families will be split apart, including those with children who are U.S. citizens or Lawful Permanent Residents and whose young children or elderly parents require care. These individuals would also be removed from communities that they have been a part of and contributed to—as friends, neighbors, volunteers—for many years. Moreover, Proposed Defendant-Intervenors, and those who are similarly situated, would remain ineligible for work authorization thereby limiting their access to employment opportunities and directly impacting their ability to support their children and families and to contribute to the U.S. economy.

For all these reasons, a preliminary injunction enjoining DAPA is not in the public's interest. DAPA was authorized specifically to enhance DHS's capacity to focus its limited resources on threats to national security, border security, and public safety, not on low priority, law-abiding individuals like Prospective Defendant-Intervenors. Any actions that undermine or hinder these efforts, such as enjoining DAPA, should be denied.

CONCLUSION

For the foregoing reasons, Proposed Defendant-Intervenors respectfully request that the Court deny Plaintiffs' Motion for Preliminary Injunction.

Dated: Jan. 14, 2015

* * * * *

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

By /s/ NINA PERALES
NINA PERALES (Tex. Bar No. 24005046;

* * * * *

Attorneys for the Proposed Defendant-Intervenors
JANE DOE #1, JANE DOE #2, and JANE DOE #3

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-CV-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

AND

JANE DOE #1, JANE DOE #2, AND JANE DOE #3,
PROPOSED DEFENDANT-INTERVENORS

APPENDIX OF DECLARATIONS

Pursuant to the Court's Civil Procedures. rule 7 (b). the Proposed Defendant-Intervenors Jane Doe #1. Jane Doe #2. and Jane Doe #3 hereby provide the Court with copies of the following declarations cited in support of the Proposed Defendant-Intervenors' (1) Motion to Intervene and Memorandum of Law in Support. and (2) [Proposed] Joinder in Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction.

NO.	DECLARATION
1.	Declaration of Defendant Intervenor Movant Jane Doe #1
2.	Declaration of Defendant Intervenor Movant Jane Doe #2
3.	Declaration of Defendant Intervenor Movant Jane Doe #3

Dated: Jan. 14, 2015

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Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

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(Requests for *pro hac vice* admission to be filed)

Attorneys for the Proposed Defendant-Intervenors
JANE DOE #1, JANE DOE #2, and **JANE DOE #3**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DEFENDANT INTERVENOR MOVANT JANE DOE #1

My name is JANE DOE #1. I am over the age of 18 and fully competent to make this declaration.

1. I live in Edinburg, TX. I have resided in the United States for 15 years.

2. I was born in 1971 in Reynosa, Tamaulipas, Mexico. I attended school in Mexico until 8th grade. In Mexico I worked as a laborer and I cooked and sold food.

3. I am married and have four children. My oldest child, **[REDACTED]**, is married; he attends college and works. Still living at home, my daughter **[REDACTED]**, who is 21, attends college and works to help support our family. My daughter **[REDACTED]** is 14 years old and is in the ninth grade. My son **[REDACTED]** is

8 years old and in the second grade. All of my children get good grades in school.

4. Here in the U.S. I work making and selling tamales and other food. I also do catalog sales. My husband also works to support our family.

5. Outside of work and my responsibilities at home, I volunteer at my church and participate in school field trips for my children.

6. I came to the United States in July 1999 and have remained in the U.S. since that time.

7. I believe that I am eligible for deferred action because I am the parent of U.S. citizen children, I have raised continuously in the U.S. since before 2010, I do not have permission to be in the U.S. and I am not an enforcement priority.

8. I want to participate in this case in order to defend deferred action for myself and other parents in my situation.

9. Because I do not have permission to be in the U.S., I would like to proceed in this case pseudonymously. I am aware of the debate in Texas over immigration as reported in the media. I am fearful that if my name and immigration status were made public, I would face opprobrium and possibly harassment from members of the public who support this law-

suit. I understand that deferred action is discretionary on the part of the federal government and am also very concerned that revealing my name and immigration status to federal authorities will subject me to possible arrest, detention and removal from the U.S.

10. If the Court grants my request to proceed as Jane Doe in this lawsuit, my attorneys will file under seal or in camera a second declaration executed by me on this same date in which my true name is revealed.

I declare under penalty of perjury pursuant to 28 U.S. Code § 1746 that the foregoing is true and correct.

Executed on this 12 day of Jan., 2015 in Edinburg, Texas.

/s/ JANE DOE #1
JANE DOE #1

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DEFENDANT INTERVENOR MOVANT JANE DOE #2

My name is JANE DOE #2. I am over the age of 18 and fully competent to make this declaration.

1. I live in McAllen, TX. I have resided in the United States for 13 years.

2. I was born in 1987 in Tepalcatepec, Michoacan, Mexico. I attended school in Mexico through the 5th grade. After my parents brought me to the United States, I attended school through the 10th grade.

3. I am married and have two children. My son **[REDACTED]** is in the first grade and my daughter **[REDACTED]** is four years old and attends a Head Start program.

4. I am currently studying for my GED. My husband is the sole wage-earner in our family. In addition to caring for my husband and children, I also take care of my mother who lives with us and who has Alzheimer's disease.

5. Outside of participating in GED classes and my responsibilities at home, I attend church every Sunday and attend Bible classes. I volunteer in church activities and I volunteer in my daughter's Head Start program.

6. I believe that I am eligible for deferred action because I am the parent of U.S. citizen children, I have raised continuously in the U.S. since before 2010, I do not have permission to be in the U.S. and I am not an enforcement priority.

7. I want to participate in this case in order to defend deferred action for myself and other parents in my situation.

8. Because I do not have permission to be in the U.S., I would like to proceed in this case pseudonymously. I am aware of the debate in Texas over immigration as reported in the media. I am fearful that if my name and immigration status were made public, I would face opprobrium and possibly harassment from members of the public who support this lawsuit. I understand that deferred action is discretionary on the part of the federal government and am

also very concerned that revealing my name and immigration status to federal authorities will subject me to possible arrest, detention and removal from the U.S.

9. If the Court grants my request to proceed as Jane Doe in this lawsuit, my attorneys will file under seal or in camera a second declaration executed by me on this same date in which my true name is revealed.

I declare under penalty of perjury pursuant to 28 U.S. Code § 1746 that the foregoing is true and correct.

Executed on this 12th day of Jan., 2015 in McAllen, Texas.

/s/ JANE DOE #2
JANE DOE #2

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DEFENDANT INTERVENOR MOVANT JANE DOE #3

My name is JANE DOE #3. I am over the age of 18 and fully competent to make this declaration.

1. I live in Donna, TX. I have resided in the United States for 11 years.

2. I was born in 1983 in Acapetahua, Chiapas, Mexico and completed high school in Mexico

3. I have a daughter who is two years old In order to support myself and my daughter, I sell items at the flea market and I make and sell food. I have also worked as a waitress at a taco restaurant and worked taking care of children in my home.

4. I believe that I am eligible for deferred action because I am the parent of U.S. citizen chil-

dren, I have raised continuously in the U.S. since before 2010, I do not have permission to be in the U.S. and I am not an enforcement priority.

5. I want to participate in this case in order to defend deferred action for myself and other parents in my situation.

6. Because I do not have permission to be in the U.S., I would like to proceed in this case pseudonymously. I am aware of the debate in Texas over immigration as reported in the media. I am fearful that if my name and immigration status were made public, I would face opprobrium and possibly harassment from members of the public who support this lawsuit. I also understand that deferred action is discretionary on the part of the federal government and am also very concerned that revealing my name and immigration status to federal authorities will subject me to possible arrest, detention and removal from the U.S.

7. If the Court grants my request to proceed as Jane Doe in this lawsuit, my attorneys will file under seal or in camera a second declaration executed by me on this same date in which my true name is revealed.

I declare under penalty of perjury pursuant to 28 U.S. Code § 1746 that the foregoing is true and correct.

Executed on this 12th day of Jan., 2015 in Donna, Texas.

/s/ JANE DOE #3
JANE DOE #3

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF MICHAEL HOEFER

I, Michael Hoefer[1], hereby make the following declaration with respect to the above captioned matter.

I. QUALIFICATIONS

1. I am a Senior Advisor for the Office of Policy & Strategy at U.S. Citizenship and Immigration Services (USCIS), a component within the U.S. Department of Homeland Security ("DHS" or "Department"). I have held this position since March 2013. I was previously the Director of the DHS Office of Immigration Statistics (OIS) from 1997 to 2013. The OIS is the lead office within DHS for the reporting and analysis of immigration data. I began working in the Statis-

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[1] Curriculum Vitae provided at Exhibit 1.

tics Office at the Immigration and Naturalization Service (INS) in March 1982.

2. I am a graduate of Cornell University with a B.S. (1976) in Industrial and Labor Relations with a concentration in applied statistics.

3. As a technical expert at OIS I authored many reports on Department immigration data and population estimates, including annual estimates of the number of unauthorized aliens residing in the United States. I was staff statistician (on detail) at the Commission on Immigration Reform from 1994-95 and was a member of the DHS Immigration Reform Team in 2007. I co-chaired the Federal Interagency Workgroup on Immigration Statistics and Research for several years. As a leading expert on U.S. immigration data, I gave an invited address to the Annual Meeting of the Committee on National Statistics, National Academy of Sciences, titled "Measuring Immigration Flows and Immigrant Populations: What Do We Know? How Can we Learn More?" in October 2008. I also testified before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, of the House Judiciary Committee in June of 2007 on the subject, "Comprehensive Immigration Reform: Government Perspectives on Immigration Statistics." This past year I was the United States representative to the Organization for Economic Co-operation and Development Expert Meeting on Migration. I also was a member, and provided sta-

tistical guidance, to the DHS task force addressing the increase in apprehensions of unaccompanied minor children beginning in the spring of 2012.

4. Resulting from my role as Senior Advisor for the Office of Policy & Strategy at USCIS, I am familiar with the 2012 Deferred Action for Childhood Arrivals policy (DACA), as well as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy and modification of DACA announced in 2014 and presently in the process of being implemented by DHS.

5. I have worked on various projects to estimate the size and characteristics of unauthorized populations, such as those who meet the guidelines for DACA. I was the lead author of DHS annual reports on the size and characteristics of unauthorized populations from 2005 to 2011. I also assisted in the development of the "Report on the Legalized Alien Population," which was sponsored by the former INS. Last year I served as an advisor on the development of a USCIS report on the "Characteristics of Individuals Requesting and Approved for DACA."

6. The purpose of this declaration is to respond to certain opinions and conclusions in the Declaration of Karl Eschbach, Ph.D., submitted as Exhibit 14 to the Plaintiffs' Reply Brief, filed in the case *State of Texas, et al., v. United States of America, et al.*, 14-cv-254, pending before the United States District Court for the Southern District of Texas.

7. In addition to the documents and information available to me as Senior Advisor for the Office of Policy & Strategy at USCIS, I have reviewed the above-referenced Declaration of Karl Eschbach, Ph.D., including attachments.

8. My views expressed in this declaration are based on my education, experience, knowledge of relevant scientific literature, knowledge of the generally accepted methodologies associated with review and analysis of statistical data regarding migrant populations, and my review of relevant documents and information. I have personal knowledge of the matters stated herein.

II. SUMMARY OF DECLARATION

9. Dr. Eschbach was retained by the Office of the Attorney General of Texas to analyze three issues: (1) whether the 2012 Deferred Action for Childhood Arrivals (DACA) policy caused an increase in the unauthorized immigrant population, and whether the 2014 Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy likely would cause concomitant increase in the unauthorized immigrant populations; (2) the method for counting the unauthorized immigrant population and the number of authorized immigrants that reside in Texas; and (3) whether unauthorized immigrants receive a disproportionate amount of uncompensated healthcare. (Eschbach Dec. at ¶ 4, pg. 2)

10. This declaration addresses Dr. Eschbach's analysis of the first of these issues, i.e. whether 2012 DACA caused an increase in the unauthorized immigrant population, and whether the 2014 deferred action policies likely would cause concomitant increase in the unauthorized immigrant populations.

11. Dr. Eschbach opines, regarding issue (1), that "DAPA will discernibly and significantly increase unauthorized immigration to the United States in two ways": (1) by encouraging both eligible and ineligible unauthorized immigrants to stay in the United States, in the hopes of attaining adjustment of status in the future and relatedly, by reducing the emigration rate of immigrants who may be considered for DAPA; and (2) by "making it more attractive for unauthorized immigrants to migrate to the United States." (Eschbach Dec. at ¶ 5(a), pg. 3). He therefore concludes that DAPA implementation will result in an increase in unauthorized immigrants. (Eschbach Dec at ¶ 5(a), pg. 4.)

12. Having reviewed Dr. Eschbach's declaration, including the data and bases for his hypotheses and conclusions, it is my opinion that Dr. Eschbach's opinions are not supported by the available evidence. DACA and DAPA are very recent policies, and they have not been fully studied. Dr. Eschbach himself notes that with respect to DACA that "there is no peer-reviewed analytic study evaluating the influences on recent trends in child migration." (Eschbach Dec.

at ¶ 26.) Dr. Eschbach's opinions rest on speculation and unsupported inferences drawn largely from historical data reflecting generalized immigration statistics (e.g., Eschbach Dec. at ¶ 12, Table 2), and a program implemented in 1986 (the Immigration Reform and Control Act or "IRCA") (Eschbach Dec. at ¶¶ 20-23). There are not sufficient data to support his conclusions.

III. DISCUSSION

13. In his analysis, Dr. Eschbach discusses unauthorized migration, including incentives that affect individuals considering whether or not to attempt an unauthorized entry into the United States, and the potential effects/incentives that policies such as DACA and DAPA may have on those individuals. He views the unauthorized immigrant population at issue as being comprised of three groups: (1) unauthorized immigrants in the United States who may apply for deferred action under DACA or DAPA; (2) "potential migrants", i.e., individuals outside the United States who do not meet the DACA/DAPA guidelines and who may be considering an illegal entry into the United States; and (3) unauthorized immigrants presently in the United States who do not meet the DACA/DAPA guidelines. (Eschbach Dec. at ¶ 16.)

14. Dr. Eschbach bases much of his speculation regarding the effect of DACA and DAPA on a rough extrapolation from pre-DACA/DAPA data, from which no relationship to DACA or DAPA can be inferred,

without considering other significant factors that may affect his conclusions. Dr. Eschbach concedes that the "flow of unauthorized entrants across the border was responsive to many influences, including primarily perceptions of relative employment opportunities and wage rates." (Eshbach Dec. at ¶ 23.) But Dr. Eschbach goes on to draw inferences regarding the causes of unauthorized migration without addressing environmental factors, such as crime, civil unrest and natural disasters. For example, he concludes that an increase in unauthorized migration can be attributed to IRCA, but the increase in the flow of unauthorized migrants since its passage was most notable between 1998 and 2002 (accounting for 42% of the total increase), which is significantly attenuated with respect to IRCA, and correlates with other events.[2]

a. Dr. Eschbach's Opinions Regarding DACA/DAPA Causing an Increase in the Unauthorized Immigrant Population are Speculative and Unreliable

15. Regarding the first of Dr. Eschbach's groups—unauthorized immigrants in the United States who meet the guidelines for consideration under DACA or DAPA—Dr. Eschbach postulates that DACA and DAPA will increase the size of the unauthorized popu-

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[2] In 1998 Hurricane Mitch devastated Central America, killing thousands and affecting more than 100,000 people. In 2001, El Salvador was struck by a series of earthquakes, killing more than a thousand people and damaging more than 100,000 homes and businesses.

lation, by: (1) deferring the removal of individuals whom he surmises would otherwise be "identified by" DHS and "subject to deportation within the time period specified in the programs"; and (2) "reducing the incentive to emigrate (i.e., return to [unauthorized immigrants'] home countr[ies])." (Eschbach Dec. at ¶ 17). The evidence he relies on to support this conclusion—data reflecting estimated removal and emigration rates for the resident unauthorized immigrant population within the United States during the period 1990-2010—predates the implementation of DACA, so this conclusion is based purely on conjecture. (Eschbach Dec. at ¶ 17, pg. 10, fn. 10.) Dr. Eschbach postulates a "crude estimate of an increase in the stock of resident unauthorized immigrants of 3 percent of the enrollees in the program for each year of their participation," before conceding that "[t]he actual number of reduced deportations/deferrals may vary" if certain factors are true. (Id.).[3] This "crude estimate" is

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[3] No recent data are available on the rate that foreign-born residents (e.g., lawful permanent residents LPRs, unauthorized residents) emigrate. The U.S. government stopped collecting information on the emigration of LPRs in 1957. The "residual" methodology used by the DHS Office of Immigration Statistics and others to estimate the size of the unauthorized population does not require an estimate of the emigration rate of the unauthorized population, but does utilize an estimate of the foreign-born emigration based by Ahmed and Robinson, "Estimates of Emigration of the Foreign-Born Population: 1980-90," Census Bureau Technical Working Paper No. 9, December 1994. Ahmed and Robinson estimate that emigration rate of the foreign born population during the

just that—an unsupported guess based on several layers of inference—and it is particularly speculative because it does not rest on data or analysis drawn from DACA or DAPA. The incentives created by DACA and DAPA with regard to emigration now or in the future, and their relationship to existing disincentives to emigrate among the DACA and DAPA community, are affected by a complex set of factors which are not considered or discussed in any meaningful way by Dr. Eschbach.[1] He later postulates that those who meet

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1980-89 period was 18.7 percent for those who entered during 1970-79, 9.1 percent for those who entered during 1960-69, and 7.1 percent for those who entered before 1960. Warren and Warren, in their estimate of 3 percent emigration, have extrapolated the emigration rates for the total foreign-born population who entered in 1970-79 and applied it to unauthorized residents who have entered the United States from 1980 to 2009.

[1] For example, lacking actual data and analysis concerning DACA and DAPA, any reasonable hypothesis regarding the effect of DACA and DAPA on incentives to emigrate, and the predicted consequence to the overall unauthorized immigrant population in the United States, would need to consider the pre-DACA and pre-DAPA incentives on the eligible population. Pursuant to the eligibility requirements of the program, the population of individuals in the United States who meet the DACA guidelines necessarily entered the United States at a young age. Their parents and immediate family are likely to be in the United States, and their primary community ties are likely to be in the United States. Conversely, this population may have diminished or non-existent family and community ties in their country of birth. The DAPA policy necessarily correlates with strong ties to the United States, including having at least one United States citizen or legal resident child and having at least 5 years of residence in the United States. Further,

the DACA/DAPA guidelines will serve as anchors for new unauthorized migration among non-DACA/DAPA populations, and by this connection he attributes that possible future growth to DACA/DAPA. (Eschbach Dec. at ¶ 28.) Dr. Eschbach provides no reliable data or analysis supporting his conclusions, which are more in the nature of conclusory assertions.

16. For example, Dr. Eschbach's declaration lacks any analysis or consideration of pre-DACA/DAPA incentives to emigrate, and present and future consequences of DACA/DAPA on that same community regarding incentives to emigrate.

17. In addition, Dr. Eschbach relies in part on data regarding the effects of the Immigration Reform and Control Act of 1986 (IRCA), a program implemented twenty-eight years ago. As I explain below, IRCA does not provide a basis on which to make predictions about DACA and DAPA.[5] Dr. Eschbach attempts to support his conclusion that DACA and DAPA will lead to an increased in the unauthorized population in the United States based on a tenuous comparison to the fact that unauthorized migration has increased in the

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inasmuch as the DACA and DAPA policies are contingent upon individuals having not been convicted of serious crimes, this population is less likely to be placed in removal proceedings.

[5] DACA and DAPA, for example, result in a temporary and revocable grant of deferred action (which is not a lawful immigration status), while IRCA allowed persons to be granted the legal status of lawful permanent resident.

decades since IRCA was passed; but the fundamental assumption—that this increase is attributable to IRCA —is itself speculative, and fails to take into account other significant factors that may affect his conclusions, like environmental and economic factors. (supra at ¶ 14.)[6] Available data, and reasonable inferences that can be drawn from them, do not support Dr. Eschbach's prediction that DAPA or DACA will increase unauthorized immigration.

18. Dr. Eschbach's opinion regarding the effect of DACA and DAPA on incentives to voluntarily emigrate is not supported by the data or reasonable inferences drawn from it. His conclusory statement that an "unambiguous effect" of DACA and DAPA is that they will "reduce the incentive to emigrate" suffers from a lack of analysis or consideration of pre-DACA/DAPA incentives to emigrate, and present and future consequences of DACA/DAPA on that same community regarding incentives to emigrate. As such, Dr. Eschbach's hypothesized growth in the unauthorized population based upon the theory that individuals who meet the DACA/DAPA guidelines who are discouraged from emigrating by DACA/DAPA will attract new unauthorized migrants, is also unsupported by the data or

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[6] If the net rate of removal remains constant, but immigration removal authorities are successful in focusing removal resources on higher priorities for removal, there would be a net qualitative benefit from DACA or DAPA, even if there is not a net quantitative increase in removals.

reasonable inferences that can be drawn from them. This is because a necessary premise of that hypothesis is that DACA or DAPA had a meaningful effect on the incentive to emigrate. Dr. Eschbach has not demonstrated DACA and DAPA have a meaningful effect on incentives to emigrate, and as such, he cannot tie any hypothesized future "anchor" growth to DACA/DAPA.

b. Dr. Eschbach's Conclusions Regarding the Effect of DACA/DAPA on Individuals who do Not Meet those Policy Guidelines Are Not Supported by the Data or His Analysis.

19. Dr. Eschbach hypothesizes that DACA and DAPA may incentivize unauthorized migrants who do not meet the policy guidelines to seek illegal entry to the United States (group "2") (See supra, ¶ 13), or to stay in the United States if they are already here (group "3") (See supra, ¶ 13). Dr. Eschbach does not purport to base this hypothesis on any data regarding DACA. (Eschbach Dec. at ¶ 26). Instead, he begins by looking at IRCA and attempting to extrapolate the consequences of DACA/DAPA based his analysis of IRCA. (Eschbach Dec. at ¶ 20) His conclusions are not supported by available data or reasonable inferences that can be drawn from that data.

20. IRCA was implemented in 1986. Dr. Eschbach asserts that IRCA was intended to "reduce the impacts of unauthorized migration . . . [through] adjustment in status of a substantial portion of the resident unauthorized populations . . . [combined

with] enhanced enforcement [which would] reduce future growth of the population." Dr. Eschbach assets that IRCA "failed to accomplish its goals" (Eschbach Dec. at ¶ 12, with citation at FN 13), and further asserts that "[i]n the 25 years after IRCA was implemented, there has not been a significant decrease in the number of unauthorized immigrants entering the United States. Instead, the unauthorized population has surged to 11.7 million individuals since its implementation." (Eschbach Dec. at ¶¶ 21-22.)[7]

21. This conclusion does not support Dr. Eschbach's hypothesis that DACA and DAPA will have "the expected effect of increasing subsequent growth of the unauthorized population." (Eschbach Dec. at ¶ 28).

22. First it is based on a flawed premise: Dr. Eschbach implies a relationship between IRCA and the growth of unauthorized populations within the United States by citing data reflecting growth in unauthorized population in the United States between 1990 and 2010 (Eschbach Dec. at ¶ 22), but this does not demonstrate a causal connection. (Eschbach Dec. ¶ 22.) In fact, Dr. Eschbach goes on to point to other primary causes for that increase, noting that "[t]he most important factors influencing" decisions to engage in unauthorized migration to the United States "are likely to be based on relative wages and job op-

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[7] I take no position on the success or failure of IRCA vis-à-vis its intended goals.

portunities in the United States and the country of origin. (Eschbach Dec. at ¶ 23, pg. 13.; ¶ 11, pg. 7.) Given the primacy Dr. Eschbach and his authorities assign to perceptions of employment opportunities and wages in the United States as incentivizing unauthorized migration, his hypothesized connection between IRCA and unauthorized migration is not supported by his own findings.

23. The mere fact of an increase in the flow of unauthorized migrants reflected in the 21 years of accumulated data between 1990 and 2010 supports no clear connection to the 1986 passage of IRCA. Further, Dr. Eschbach fails to consider other factors affecting the flow of unauthorized migrants to the United States.

24. Dr. Eschbach references trend data, including data reflecting increased apprehensions of unauthorized immigrants, "changes in the effectiveness of border enforcement," and other "confounding influences on trend data" (Eschbach Dec. at ¶ 24, pg. 13), but this discussion fails to shed any light on IRCA, subsequent growth of unauthorized migration, and how, if at all, they are connected.

25. In support of his hypothesis that DACA and DAPA will increase the growth of unauthorized immigrant populations among individuals who do not meet the guidelines under those policies, Dr. Eschbach theorizes a connection between the unaccompanied minors ("UAC") surge and DACA. He does this by juxtaposing the 2012 implementation of DACA with statistical

data regarding UAC border apprehensions before and after the implementation of DACA, and which reflect the UAC surge. (Eschbach Dec. at ¶¶ 25-26). Dr. Eschbach's hypothesis is premised upon the assumption that DACA created a "climate of expectations . . . that status adjustments might be available to resident unauthorized children" rather than on data or reasonable inferences derived therefrom, and that DAPA and DACA expansion will create a similar misimpression.

26. Notably, after conceding an absence of peer-reviewed studies supporting his hypothesis, Dr. Eschbach concedes that another statute, the Trafficking Victims Protection Reauthorization Act of 2008 (not DACA), was "the recent policy most directly related to the differential treatment of the Central American child population that has contributed the largest numbers to the recent increase in unauthorized migration by children." (Eschbach Dec. at ¶ 26.) Nevertheless, Dr. Eschbach asserts a meaningful connection between DACA and the UAC surge, and bases that connection largely on a hypothesized misinformation effect, i.e., that individuals may have sent their children to the U.S. border based on the mistaken belief that they meet the DACA guidelines. (Eschbach Dec. at, 26 (" . . . contributed to a climate of expectation . . . ")). But Dr. Eschbach's analysis of the extent of the hypothesized misinformation effect is flawed. And moreover, any misinformation effect has abated, as shown below, and there is no support for Dr.

Eschbach's inference that DAPA or DACA would have a similar impact in the future.

27. The reasonable inference to be drawn from available data is that DACA did not create a "discernabl[e] and significan[t]" incentive for "increased unauthorized migration." (Eschbach Dec. at ¶ 5). The initial increase in apprehensions of Central American children began before the DHS Secretary announced DACA on June 15, 2012 (approximately 9 months into Fiscal Year 2012). In particular, apprehensions of Central American[8] children had been fairly steady in Fiscal Years 2009-11; however, child[9] apprehensions increased 147 percent between Fiscal Years 2011 and 2012 (Exhibit 2, Chart 1). The increase in Central American child apprehensions during the first 9 months of Fiscal Year 2012 (October 1, 2011 to June 30, 2012) was 112 percent above comparable months during Fiscal Year 2011. This increase is *prior* to the date of the DACA announcement. These differences contravene a reasonable inference that DACA was the primary factor affecting migration decisions during the relevant time period. Finally, and as further described below, while a misinformation effect may have

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[8] This reference is to citizens of El Salvador, Guatemala, and Honduras, who account for nearly all of the apprehensions from Central America.

[9] Here, children are defined as persons under 18 years old, including Unaccompanied Minors (UAC) and those entering with others.

briefly existed and, as a result, motivated some individuals to attempt illegal migration, or send their children to the U.S. border, based on a misunderstanding of the DACA policy (infra at ¶¶ 30, 31), available data suggest that the effect was temporary and will not be a permanent feature of DACA, or a predictable consequence of DAPA (infra at ¶¶ 30-31). There is no data supporting the conclusion that a misinformation effect had a significant effect on migration rates.

28. An increase in apprehension of adults at the border also preceded the implementation of the 2012 DACA policy. Mirroring the patterns for children, Central American adult apprehensions had been fairly steady in Fiscal Years 2009-11 and then increased by 103 percent between Fiscal Years 2011 and 2012 (Exhibit 2, Chart 1).

29. Historically, Mexicans have represented the largest single nationality among persons apprehended by the U.S. Border Patrol. Recent apprehension trends for Mexicans are strikingly different from trends for Central Americans, suggesting that factors other than DACA have had the most influence on recent migration decisions. Mexican adult apprehensions have decreased annually from 442,000 in 2009 to 206,000 in 2014 (Exhibit 2, Chart 4). Mexican child apprehensions have also declined. Apprehensions of Mexican children have decreased from 61,000 in 2009 to 24,000 in 2014 (Exhibit 2, Chart 4). Conversely, there has been continued growth in the number of

Central American children apprehended by the U.S. Border Patrol following the DACA announcement in June 2012, peaking in June 2014 (Exhibit 2, Table 1). The increasing trend in apprehensions of Central American adults, who clearly do not meet DACA guidelines, has also continued through 2014. The proportion of children among all Central American apprehensions, however, has increased from about 16 percent in Fiscal Years 2009-11, to 19 percent in 2012, 23 percent in 2013, and then to 38 percent in 2014. The concomitant increase in adult and child apprehensions before and after the DACA announcement suggests that macro factors such as economic or safety concerns were pushing Central Americans to migrate in 2012 rather than the DACA policy.[10]

30. If DACA had in fact created incentives among potential migrants who are ineligible for that program, child or otherwise, it is reasonable to conclude that those incentives would be constant as between Mexi-

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[10] For example, Central American children interviewed in U.S. detention facilities in 2012 reported that "dramatic increases in violence and poverty in their home countries" were the main reasons they migrated to the United States. See "Forced From Home: The Lost Boys and Girls of Central America," Women's Refugee Commission, October 2012, Page 1. A UNHCR report also found that "forty-eight percent of the displaced children interviewed for this study shared experiences of how they had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors." See "Children on the Run," UNHCR, July 2014, page 6.

can migrants and Central American migrants, yet the data reflects significantly different migration patterns. Dr. Eschbach does not address this discrepancy, which significantly undercuts his primary hypothesis regarding DACA's effect on UAC migration.

31. Dr. Eschbach hypothesizes that DACA may have initially had a misinformation effect among individuals considering illegal migration to the United States, such that individuals who do not meet the DACA guidelines may have attempted unauthorized migration, or sent their children to the U.S. border, based upon a mistaken understanding of DACA. This hypothesis does not provide a reasonable basis for extrapolating to future effects of DACA and DAPA. Dr. Eschbach does not identify data from which it can be determined the extent, if any, that a false expectation of non-removal based on a misinterpretation of DACA, or a misunderstanding about eligibility for other immigration programs, or other factors affected the UAC surge, and to what extent it has affected migration patterns generally. Moreover, the available data reflect a decrease of UAC migration in the latter half of 2014, a trend which corresponds to the redoubled efforts of DHS to inform the parents of children who were considering sending their children to the U.S. border that those apprehended would be a priority for deportation and that their children were not

eligible for DACA.[11] DHS also initiated a series of responses focused on stepped up deterrence, enhanced enforcement, stronger regional cooperation, and greater capacity of affected Federal agencies to ensure that the U.S. border remained secure. The monthly number of apprehensions of Central Americans dropped from 38,790 in June 2014, to 23,170 in July, and leveled off at approximately 9,500 during the months of September to December 2014 (Exhibit 2, Table 1). This rapid and significant decrease in apprehensions following the DHS's increased education efforts supports a reasonable inference that even assuming there was a misinformation-effect on migration related to DACA, any such effect was mitigated through the information campaign and stepped up enforcement. In sum, available data indicate that any hypothesized misinformation effect was likely temporary and has abated, and it would not be reasonable to infer from these data that DACA or DAPA will cause a significant misinformation effect in the future.

32. Dr. Eschbach's hypothesized connection between the UAC surge, or indeed any migration effect,

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[11] See "An Open Letter to the Parents of Children Crossing Our Southwest Border," June 23, 2014; http://www.dhs.gov/news/2014/06/23/open-letter-parents-children-crossing-our-southwest-border; "Statement by Secretary Johnson About the Situation Along the Southwest Border," September 8, 2014, http://www.dhs.gov/news/2014/09/08/statement-secretary-johnson-about-situation-along-southwest-border for a description responses taken to address the increase in South West border apprehensions.

and DACA and DAPA do not rest on peer reviewed analysis, or on a complete analysis of the empirical data.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of Jan., 2015

/s/ MICHAEL HOEFER
MICHAEL HOEFER

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

[SEAL OMITTED] **Homeland Security**

Nov. 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and
Customs Enforcement

Megan Mack
Officer
Office of Civil Rights and
Civil Liberties

Philip A. McNamara
Assistant Secretary for
Intergovernmental Affairs

FROM: /s/ JEH CHARLES JOHNSON
JEH CHARLES JOHNSON
Security

SUBJECT: **Secure Communities**

The Secure Communities programs, as we know it, will be discontinued.

The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attract-

ed a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the programs, and many have issued executive orders or signed haws prohibiting such cooperation. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program.

The overarching goal of Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary. As recommended by the Homeland Security Advisory Council Task Force, Secure Communities "must be implemented in a way that supports community policing and sustains the trust of all elements of the community in working with local law enforcement."

Accordingly, I am directing U.S. Immigration and Customs Enforcement (ICE) to discontinue Secure Communities. ICE should put in its place a program that will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of investigation for criminal background checks. However, ICE should only seek the transfer of an alien

in the custody of state or local law enforcement through the new program when the alien has been convicted of an offense listed in Priority 1(a), (c), (d), and (e) and Priority 2(a) and (b) of the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum, or when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security. In other words, unless the alien poses a demonstrable risk to national security, enforcement actions through the new program will only be taken against aliens who are convicted of specifically enumerated crimes.

Further, to address the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment,[1] I am directing ICE to

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[1] *See, e.g., Miranda-Olivares*, 2014 WL 1414305, at *11 (D. Orc. Apr. 11, 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"). *See also Moreno v. Napolitano*, case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probably cause requirements); *Gonzalez v. ICE*, Case No. 2:13-cv-0441-BRO-FFM, at 12-13 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their

replace requests for detention (*i.e.*, requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification (*i.e.*, requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority).

If in special circumstances ICE seeks to issue a request for detention (rather than a request for notification), it must specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien,

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authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatoski*, — F. Sup. 2d —, 2014 WL 1795631, at *10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probably cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, Civ. Action No. 10-cv-06815, 2012 WL 1080020, at *14 (E.D. Penn. March 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable cause), rev'd and remanded on other grounds, 745 F.3d 634 (reversing district court's finding of no municipal liability); *Uroza v. Salt Lake City*, No. 2:11CV713DAK, 2013 WL 653968, at *6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). *Cf. Makowski v. United Statesi*, — F. Supp. 2d —, 2014 WL 1089119, at *10 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

thereby addressing the Fourth Amendment concerns raised in recent federal court decisions.

This new program should be referred to as the "priority Enforcement Program" or "PEP."

Nothing in this memorandum shall prevent ICE from seeking the transfer of an alien from a state or local law enforcement agency when ICE has otherwise determined that the alien is a priority under the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum and the state or locality agrees to cooperate with such transfer. DHS will monitor these activities at the state and local level, including through the collection and analysis of data, to detect inappropriate use to support or engage in biased policing, and will establish effective remedial measures to stop any such misuses.[2] I direct the Office of Civil Rights and Civil Liberties to develop and implement a plan to monitor state and local law enforcement agencies participating in such transfers.

Finally, acquainting state and local governments, and their law enforcement components, with this policy change will be crucial to its success. I therefore direct the Assistant Secretary for Intergovernmental Affairs to formulate a plan and coordinate an effort to

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[2] *See* Homeland Security Advisory Council, *Task Force on Secure Communities Findings and Recommendations*, September 2011.

engage state and local governments about this and related changes to our enforcement policies. I am willing to personally participate in these discussions.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF DONALD W. NEUFELD

I, Donald W. Neufeld, hereby make the following declaration with respect to the above captioned matter.

1. I am the Associate Director for Service Center Operations (SCOPS) for U.S. Citizenship and Immigration Services (USCIS), a component within the U.S. Department of Homeland Security (DHS or Department). I have held this position since January 2010. In this position, I oversee all policy, planning, management and execution functions of SCOPS. My current job duties include overseeing a workforce of more than 3,000 government employees and 1,500 contract employees at the four USCIS Service Centers located in California, Nebraska, Texas and Vermont. These four centers adjudicate about four million immigration-related applications and requests annually, including all requests for deferred action under the

Deferred Action for Childhood Arrivals (DACA) process.

2. I was previously the Deputy/Acting Associate Director for USCIS Domestic Operations from June 2007 to January 2010 where I oversaw all immigration adjudication activities at USCIS's four Service Centers and 87 field offices throughout the United States, as well as 130 Application Support Centers, four Regional Offices, two Call Centers, the Card Production Facility and the National Benefits Center. From January 2006 to June 2007, I was Chief of USCIS Field Operations managing and overseeing the 87 field offices delivering immigration benefit services directly to applicants and petitioners in communities across the United States and the National Benefits Center (NBC) which performs centralized front-end processing of certain applications and petitions. My career with USCIS and the legacy Immigration and Naturalization Service spans more than 30 years, where I have held several leadership positions including Deputy Assistant District Director for the Los Angeles District, Assistant District Director and later District Director of the Miami District, and Service Center Director for the California and Nebraska Service Centers. I began my career in 1983, initially hired as a clerk in the Los Angeles District, then serving as an Information Officer, then an Immigration Examiner, conducting interviews and adjudicating applications for immigration benefits. I also performed inspections of arriving passengers at Los Angeles International Airport.

3. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

USCIS's Role in Immigration Enforcement

4. DHS has three components with responsibilities over the enforcement of the nation's immigration laws: (1) Immigration and Customs Enforcement (ICE); (2) Customs and Border Protection (CBP); and (3) USCIS. USCIS is the DHS component that administers a variety of immigration-related programs. Currently, USCIS adjudicates approximately seven million applications, petitions and requests per year, including applications for naturalization by lawful permanent residents (LPRs), immigrant visa petitions (including employment-based visa petitions filed by U.S. employers and family-based visa petitions filed by U.S. citizens and LPRs), a variety of non-immigrant petitions (including temporary worker categories such as the H-1B), asylum and refugee status, other humanitarian protections under the Violence Against Women Act (VAWA) and for victims of trafficking and crimes, humanitarian parole, and deferred action, among others.

5. USCIS's current budget is approximately $3.2 billion. This budget is funded overwhelmingly by user fees paid by individuals who file applications. Only approximately 5% of our budget is from Congressionally-appropriated taxpayer funds, and those appropriations are specifically designated for

operation and maintenance of the employment verification system, known as E-Verify, and for limited citizenship-related services (none of which are related to requests for deferred action).

6. USCIS employs approximately 13,000 federal employees and an additional 5,000 contract employees housed in a range of facilities throughout the United States and overseas. USCIS maintains 87 Field Offices under its Field Operations Directorate (FOD) and four major Service Centers under SCOPS. These Service Centers are located in Dallas, Texas; Laguna Niguel, California; Lincoln, Nebraska; and St. Albans, Vermont. Altogether, the Service Centers employ approximately 3,000 federal workers. USCIS also operates the NBC, which is similar in size to a Service Center. The NBC performs some limited adjudications, although it was originally established to prepare cases for adjudication in other offices by conducting pre-interview case review.

7. The Field Offices and Service Centers adjudicate a wide range of immigration-related applications and requests. USCIS distributes the responsibility for processing and adjudicating various categories of applications and requests among the Field Offices and Service Centers based on multiple considerations in order to achieve maximum efficiency, reliability, consistency, and accuracy.

8. The Service Centers are designed to adjudicate applications, petitions and requests of pro-

grams that have higher-volume caseloads, including non-immigrant visa petitions (such as H-1Bs), I-130 petitions establishing relationships between a U.S. citizen or LPR and a foreign national relative, employment-based applications for adjustment of status to lawful permanent residence, multiple forms of humanitarian protection (including temporary protected status, protection under the VAWA, non-immigrant status for victims of crimes and trafficking), and requests for deferred action under the DACA process.[1]

9. In addition to the Field Offices and Service Centers, USCIS also uses three centralized "lockboxes" for the initial receipt and processing of most applications, requests, and fee payments received by the

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[1] DACA is not the only deferred action program handled by USCIS Service Centers. For example, the Vermont Service Center (VSC) currently administers two programs through which individuals may be placed in deferred action, one related to relief under VAWA and one related to U nonimmigrant status. VAWA allows certain spouses, children, and parents to self-petition for family-based immigration benefits if they have been battered or subjected to extreme cruelty by the U.S citizen or LPR spouse or parent, or U.S. citizen son or daughter. If the VAWA self-petition is approved by VSC, the self-petitioner can file an application for adjustment of status that is adjudicated by the appropriate field office. In addition, based on the approved self-petition, the self-petitioner is eligible for consideration for deferred action and for an employment authorization document. VSC adjudicates all VAWA self-petitions and also administers the deferred action and EAD component of the VAWA program.

agency each year. At the lockbox, every application and request is opened, reviewed for basic filing requirements, then fees are collected, and data is captured. In order to ensure reliability and proper processing, each application and request must be logged into one of the USCIS computer systems, the paper applications and requests must be scanned, the payment must be processed, a receipt must be issued, and the hardcopy applications and requests must be distributed to the appropriate Field Office, Service Center, or the NBC for further processing.

The DACA Process

10. In 2012, then-Secretary of Homeland Security Napolitano "set[] forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws." In doing so, USCIS was tasked with implementing the DACA process and adjudicating these requests for deferred action. As explained by then-Secretary Napolitano, the DACA process supports DHS-wide efforts to efficiently prioritize overall enforcement resources through the removal of criminals, recent border crossers, and aliens who pose a threat to national security and public safety, while recognizing humanitarian principles embedded within our immigration laws. The individuals who could be considered for DACA "lacked the intent to violate the law" because they were "young people brought to this country as children[.]" She further explained such chil-

dren and young adults could be considered, on a case-by-case basis, for deferred action if they met the guidelines, passed a criminal background check, and lived in the U.S. continuously for five years. Secretary Napolitano explained that DACA was part of "additional measures to ensure that [DHS's] enforcement resources [were] not expended on these low priority cases but [were] instead appropriately focused on people who meet [DHS's] enforcement priorities." *See* Exhibit A (June 15, 2012 Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," (hereinafter "the Napolitano Memo")).

11. Under DACA, aliens brought to the United States as children before the age of 16 and who are determined to meet other certain guidelines, including continuous residence in the United States since June 15, 2007, can be considered for deferred action on a case-by-case basis.[2] Requestors who meet the guide-

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[2] The guidelines for DACA under the Napolitano Memo include: 1) being under the age of 31 as of June 15, 2012; 2) entering the U.S. before reaching the age of 16; 3) continuously residing in the U.S. since June 15, 2007 to the present time; 4) being physically present in the U.S. on June 15, 2012 and at the time of making the request for consideration for DACA; 5) having no lawful status on June 15, 2012; 6) being currently in school, having graduated or obtained a certificate of completion from high school, having obtained a General Educational Development (GED) certificate, or being an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and, 7) having not been con-

lines are not automatically granted deferred action under DACA. Rather, each initial DACA request is individually considered, wherein an adjudicator must determine whether a requestor meets the guidelines and whether there are other factors that might adversely impact the favorable exercise of discretion.

12. In addition to satisfying the DACA guidelines, requestors must submit to, and pay for, a background check. Information discovered in the background check process is also considered in the overall discretionary analysis. If granted, the period of deferred action under the existing DACA program is—depending on the date of the grant—two or three years.[3] Requestors simultaneously apply for employment authorization, although the application for employment authorization is not adjudicated until a decision is made on the underlying DACA request.

13. Procedurally, the review and adjudication of an initial request for deferred action under DACA is a multi-step, case-specific process described in greater detail below. The process begins with the request be-

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victed of a felony, a significant misdemeanor, three or more other misdemeanors, and not otherwise posing a threat to national security or public safety.

[3] The 2012 Napolitano Memo directed USCIS to issue two-year periods of deferred action under DACA. Pursuant to the November, 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewals now receive a three-year period of deferred action.

ing mailed to a USCIS lockbox, which then reviews requests for completeness. Following review at the lock-box stage, those requests that are not rejected (as briefly described below) are sent to one of the four USCIS Service Centers for further substantive processing. Once a case arrives at a Service Center, a specially trained USCIS adjudicator is assigned to determine whether the requestor satisfies the DACA guidelines and ultimately determine whether a request should be approved or denied.

14. Unlike a "denial," a DACA request is "rejected" when the lockbox determines upon intake that the request has a fatal flaw, such as failure to submit the required fee,[4] failure to sign the request, illegible or missing required fields on the form, or it is clear that the requestor does not satisfy the age guidelines.

15. A DACA request is "denied" when a USCIS adjudicator, on a case-by-case basis, determines that the requestor has not demonstrated that they satisfy the guidelines for DACA or when an adjudicator determines that deferred action should be denied even though the threshold guidelines are met. Both scenarios necessarily involve the consideration of and exercise of USCIS's discretion.

16. Adjudicators evaluate the evidence each requestor submits in conjunction with the relevant

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[4] Very limited fee exemptions are considered. *See* Exhibit B (FAQ 8).

DACA guidelines, assess the appropriate weight to accord such evidence, and ultimately determine whether the evidence is sufficient to satisfy the guidelines. Adjudicators must utilize judgment in determining weight accorded to the submitted evidence.

17. Where a guideline is not prescriptive, USCIS must also exercise significant discretion in determining whether that guideline, and the requestor's case in relation to that guideline, counsels for or against a grant of deferred action. For example, one of the DACA guidelines is that the requestor "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." *See* Exhibit A, at 1. While determining whether a requestor has been convicted of a felony is straightforward, determining whether a requestor "poses a threat to national security or public safety" necessarily involves the exercise of the agency's discretion.

18. Even if it is determined that a requestor has satisfied the threshold DACA guidelines, USCIS may exercise discretion to deny a request where other factors make the grant of deferred action inappropriate. For example, if the DACA requestor is believed to have submitted false statements or attempted to commit fraud in a prior application or petition, USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met. As another example, when USCIS learned that a

DACA requestor falsely claimed to be a U.S. citizen and had prior removals, as an exercise of discretion, USCIS denied the request even though those issues are not specifically part of the DACA guidelines.

19. Under current DACA procedures, denials issued solely on discretionary grounds, including for national security and public safety reasons, are generally required to undergo review by USCIS headquarters. There is an exception to that requirement for cases involving gang affiliation—where such affiliation is confirmed by interview—and those cases may be denied without further guidance from USCIS headquarters. After an adjudicator in a USCIS Service Center determines that, in his or her discretion, a request should be denied for purely discretionary reasons, the adjudicator may send to USCIS headquarters a "Request for Adjudicative Guidance," which summarizes the case, usually recommends a denial for discretionary reasons, and seeks concurrence or guidance before rendering a final decision. This process has been established to allow USCIS to ensure consistency and avoid arbitrary decisions regarding discretionary denials.

20. Adjudicators have the authority to verify documents, facts, and statements provided by the requestor by contacting educational institutions, other government agencies, employers, or other entities. *See* Exhibit B (USCIS Frequently Asked Questions for DACA Requestors (hereinafter DACA FAQs)), FAQ

21. In addition, adjudicators at the Service Centers may refer a case for interview at a Field Office. *See* Exhibit C (redacted DACA interview notices). Typically, an interview would be requested when the adjudicator determines, after careful review of the request and supporting documents, that a request is deniable, but potentially curable, with information that can best be received through an interview instead of requesting additional supporting documents. For example, where an adjudicator suspected a requestor was associated with a gang, an interview was conducted to question the requestor regarding this association.

21. An adjudicator may also issue a "Request for Evidence" (RFE) or a Notice of Intent to Deny (NOID) to require the requestor to submit additional evidence in support of the request for DACA. An RFE is issued when not all of the required initial evidence has been submitted or the adjudicator determines that the totality of the evidence submitted does not meet the DACA guidelines or other discretionary factors. A NOID is more appropriate than issuing an RFE when the officer intends to deny the request based on the evidence already submitted because the request does not appear to meet DACA guidelines or other discretionary factors, but the request is not necessarily incurable. Since August 15, 2012 through December 31, 2014, 188,767 RFEs and 6,496 NOIDs have been issued in the process of adjudicating DACA requests. Failure to respond may result in a denial. *See* Exhibit D (redacted DACA-related RFEs and

NOIDs); Exhibit E. In addition, all DACA requestors must submit to background checks, and requests are denied if these background checks show that deferred action would be inappropriate. Information discovered in this process may be provided to ICE, CBP, and other law enforcement authorities for further action if appropriate. *See* Exhibit B (DACA FAQs 19 and 20).

22. If USCIS denies a DACA request, USCIS applies its policy guidance governing the referral of cases to ICE. Normally, if the case does not involve a criminal offense, fraud, or a threat to national security or public safety, the case is not referred to ICE for purposes of removal proceedings. Many of the cases involving discretionary denials were referred to ICE due to public safety issues.

23. Since the inception of DACA through December 31, 2014, USCIS accepted as filed 727,164 initial requests for deferred action under DACA. An additional 43,174 requests were submitted to USCIS, but were rejected at the lockbox stage. Of the 727,164 initial requests that were accepted for filing, 638,897 were approved, 38,597 were ultimately denied, and the rest remain pending. All DACA requestors also submit applications for employment authorization. Of

the 970,735 employment authorization applications received, 825,640 were approved.[5] *See* Exhibit E.

24. The reasons for these 38,597 denials vary. Most were based on a determination that the requestor failed to meet certain threshold criteria, such as continuous residence in the United States. Other denials involved cases in which the deciding official exercised further judgment and discretion in applying the criteria set forth in the policy, including where individuals were determined to pose a public safety risk based on the individual circumstances of the case. For example, DACA requests have been denied for discretionary public safety reasons because the requestor was suspected of gang membership or gang-related activity, had a series of arrests without convictions, arrests resulting in pre-trial diversionary programs, or ongoing criminal investigations. Requests have also been denied on the basis that deferred action was not appropriate for other reasons not expressly set forth in 2012 DACA Memorandum, such as evidence of immigration fraud. See supra ¶ 18 (citing examples). Until very recently, USCIS lacked any ability to automatically track and sort the reasons for

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[5] The total number of employment authorization document application receipts is higher than the number of DACA requests because USCIS systems do not distinguish between employment authorization document applications made by initial requestors, renewal requestors, or those seeking to replace an employment authorization document.

DACA denials, and it still lacks the ability to do so for all DACA denials except for very recent ones.

25. DACA is funded exclusively through the fees requestors submit with their DACA request. No Congressional appropriations are used to administer DACA.

2014 DACA Modifications and Deferred Action for Parents of U.S. Citizens and LPRs (DAPA)

26. On November 20, 2014, Secretary Johnson issued a memorandum directing DHS to implement certain modifications to DACA and to create a process for certain parents of U.S. Citizens and LPRs to apply for deferred action (DAPA). The DACA modifications include: (1) allowing individuals over 31 to request deferred action; (2) increasing the period of deferred action and work authorization from two to three years; and (3) adjusting the date regarding the beginning of the continuous residence period from June 15, 2007 to January 1, 2010. These modifications will not change the case-by-case process for reviewing DACA requests described above. USCIS is in the process of determining the procedures for reviewing requests under DAP A, and thus USCIS has not yet determined whether the process to adjudicate DAPA requests will be similar to the DACA process. However, as with DACA, DAPA will be funded through fees submitted by requestors, and USCIS will not use Congressional appropriations to administer DAPA.

27. The 2014 DACA modifications and DAPA do not restrict the longstanding authority of USCIS to grant deferred action in the exercise of its discretion. Accordingly, if a requestor is denied DACA or DAPA, USCIS may consider deferred action for the requestor if such action is considered appropriate in the agency's discretion. *See* Exhibit B (DACA FAQ 71).

28. USCIS has taken some steps to implement the expanded DACA and DAPA, such as securing adequate office space and beginning to develop a form, among others. In taking these steps, USCIS has counted on receiving the fees that will be generated by requestors when submissions commence in February for DACA and May 2015 for DAPA. USCIS has carefully calibrated expenses incurred in light of anticipated revenues to ensure the continuing fiscal integrity of our budget. USCIS's budget contemplates that we will begin receiving fees from requestors soon to cover some of the expenses we have already incurred and fund the process as it continues to go forward.

29. Based on our experience implementing DACA in 2012, we anticipate that fewer than the total number of estimated persons who might meet the guidelines for DAPA would submit requests. The total estimated population for DACA was projected to be approximately 1.2 million individuals in 2012. To date, approximately 720,000 initial DACA requests, or roughly 60% of the total estimated population, have been received by the agency. The projected total population

for DAPA is estimated at approximately 3.85 million. USCIS currently anticipates approximately 50% of this population will submit requests in the 18-month period after USCIS begins accepting requests.

30. As the foregoing paragraphs explain, the DACA program requires case-by-case consideration of each request and provides for individualized adjudicatory judgment and discretion. Each case is first reviewed by lockbox contractors who reject requests that are incomplete. All non-rejected cases are then forwarded to a USCIS Service Center for a case-by-case review. Upon careful review of the case, adjudicators regularly issue RFEs and NOIDs for additional evidence, where after initially reviewing the request, adjudicators determine the request is deniable, but also curable with additional evidence. In making a decision on each case, adjudicators must carefully evaluate the weight of the submitted evidence to ensure compliance with the discretionary guidelines broadly outlined by the Secretary when establishing DACA. They must also make determinations on individual requests based on non-prescriptive guidelines such as "public safety" and "national security." Finally, in DACA, USCIS exercises its discretion by otherwise denying a request where other factors not included in the guidelines would make the grant of deferred action inappropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of Jan. of 2015.

/s/ DONALD W. NEUFELD
DONALD W. NEUFELD

[SEAL OMITTED] U.S. Citizenship and Immigration Services

Frequently Asked Questions

FAQs updated Oct. 23, 2014

General Information for All Requestors

- **What is Deferred Action for Childhood Arrivals?**
- **DACA Process**
- **Background Checks**
- **After USCIS Makes a Decision**

Initial Requests for DACA
Renewal of DACA
Travel
Criminal Convictions
Miscellaneous

I. General Information for All Requestors

A. What is Deferred Action for Childhood Arrivals?

Over the past several years, this Administration has undertaken an unprecedented effort to transform the immigration enforcement system into one that focuses on national security, public safety, border security and the integrity of the immigration system. As the Department of Homeland Security (DHS) continues to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety, DHS will exercise prosecutorial dis-

cretion as appropriate to ensure that enforcement resources are not expended on low priority cases, such as individuals who came to the United States as children and meet other key guidelines. Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals (DACA) for a period of three years, subject to renewal for a period of three years, and may be eligible for employment authorization.

You may request consideration of DACA if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012, meaning that:
    - You never had a lawful immigration status on or before June 15, 2012, or
    - Any lawful immigration status or parole that you obtained prior to June 15, 2012, had expired as of June 15, 2012;

6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

7. Have not been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Individuals can call U.S. Citizenship and Immigration Services (USCIS) at 1-800-375-5283 with questions or to request more information on DACA. Those with pending requests can also use a number of online self-help tools which include the ability to check case status and processing times, change your address, and send an inquiry about a case pending longer than posted processing times or non-delivery of a card or document.

Q1: What is deferred action?

A1: Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period

deferred action is in effect. However, deferred action does not confer **lawful status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time, at the agency's discretion.

Q2: What is DACA?

A2: On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of three years, subject to renewal, and would then be eligible for work authorization.

Individuals who can demonstrate through verifiable documentation that they meet these guidelines will be considered for deferred action. Determinations will be made on a case-by-case basis under the DACA guidelines.

Q3: Is there any difference between "deferred action" and DACA under this process?

A3: DACA is one form of deferred action. The relief an individual receives under DACA is identical for immigration purposes to the relief obtained by any

person who receives deferred action as an act of prosecutorial discretion.

Q4: If my removal is deferred under the consideration of DACA, am I eligible for employment authorization?

A4: Yes. Under existing regulations, if your case is deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.

Q5: If my case is deferred, am I in lawful status for the period of deferral?

A5: No. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.

The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time. **Individuals granted deferred action are not precluded by federal law from establishing domicile in the U.S.**

Apart from the immigration laws, "lawful presence," "lawful status" and similar terms are used in various

other federal and state laws. For information on how those laws affect individuals who receive a favorable exercise of prosecutorial discretion under DACA, please contact the appropriate federal, state or local authorities.

Q6: Can I renew my period of deferred action and employment authorization under DACA?

A6: Yes. You may request consideration for a renewal of your DACA. Your request for a renewal will be considered on a case-by-case basis. If USCIS renews its exercise of discretion under DACA for your case, you will receive deferred action for another three years, and if you demonstrate an economic necessity for employment, you may receive employment authorization throughout that period.

B. DACA Process

Q7: How do I request consideration of DACA?

A7: To request consideration of DACA (either as an initial request or to request a renewal), you must submit Form I-821D, Consideration of Deferred Action for Childhood Arrivals to USCIS. Please visit www.uscis.gov/i-821d before you begin the process to make sure you are using the most current version of the form available. This form must be completed, properly signed and accompanied by a Form I-765, Application for Employment Authorization, and a Form I-765WS, Worksheet, establishing your economic need for employment. If you fail to submit a completed Form I-765 (along with the accompanying filing fees

for that form, totaling $465), USCIS will not consider your request for deferred action. Please read the form instructions to ensure that you answer the appropriate questions (determined by whether you are submitting an initial or renewal request) and that you submit all the required documentation to support your initial request.

You must file your request for consideration of DACA at the USCIS Lockbox. You can find the mailing address and instructions at www.uscis.gov/i-821d. As of June 5, 2014, requestors must use the new version of the form. After your Form I-821D, Form I-765, and Form I-765 Worksheet have been received, USCIS will review them for completeness, including submission of the required fee, initial evidence and supporting documents (for initial filings).

If it is determined that the request is complete, USCIS will send you a receipt notice. USCIS will then send you an appointment notice to visit an Application Support Center (ASC) for biometric services, if an appointment is required. Please make sure you read and follow the directions in the notice. Failure to attend your biometrics appointment may delay processing of your request for consideration of deferred action, or may result in a denial of your request. You may also choose to receive an email and/or text message notifying you that your form has been accepted by completing a Form G-1145, E-Notification of Application/Petition Acceptance.

Each request for consideration of DACA will be reviewed on an individual, case-by-case basis. USCIS may request more information or evidence from you, or request that you appear at a USCIS office. USCIS will notify you of its determination in writing.

Note: All individuals who believe they meet the guidelines, including those in removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA from USCIS through this process. Individuals who are currently in immigration detention and believe they meet the guidelines may not request consideration of deferred action from USCIS but may identify themselves to their deportation officer or Jail Liaison. You may also contact the ICE Field Office Director. For more information visit ICE's website at www.ice.gov/daca.

Q8: Can I obtain a fee waiver or fee exemption for this process?

A8: There are no fee waivers available for employment authorization applications connected to DACA. There are very limited fee exemptions available. Requests for fee exemptions must be filed and favorably adjudicated before an individual files his/her request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must submit a letter and supporting documentation to USCIS demonstrating that you meet one of the following conditions:

- You are under 18 years of age, have an income that is less than 150 percent of the U.S. poverty level, and are in foster care or otherwise lacking any parental or other familial support; or
- You are under 18 years of age and homeless; or
- You cannot care for yourself because you suffer from a serious, chronic disability and your income is less than 150 percent of the U.S. poverty level; or,
- You have, at the time of the request, accumulated **$10,000** or more in debt in the past 12 months as a result of unreimbursed medical expenses for yourself or an immediate family member, and your income is less than 150 percent of the U.S. poverty level.

You can find additional information on our Fee Exemption Guidance Web page. Your request must be submitted and decided before you submit a request for consideration of DACA without a fee. In order to be considered for a fee exemption, you must provide documentary evidence to demonstrate that you meet any of the above conditions at the time that you make the request. For evidence, USCIS will:

- Accept affidavits from community-based or religious organizations to establish a requestor's homelessness or lack of parental or other familial financial support.

- Accept copies of tax returns, bank statement, pay stubs, or other reliable evidence of income level. Evidence can also include an affidavit from the applicant or a responsible third party attesting that the applicant does not file tax returns, has no bank accounts, and/or has no income to prove income level.
- Accept copies of medical records, insurance records, bank statements, or other reliable evidence of unreimbursed medical expenses of at least **$10,000.**
- Address factual questions through Requests for Evidence (RFEs).

Q9: If individuals meet the guidelines for consideration of DACA and are encountered by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), will they be placed into removal proceedings?

A9: DACA is intended, in part, to allow CBP and ICE to focus on priority cases. Under the direction of the Secretary of Homeland Security, if an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. If individuals believe that, in light of this policy, they should not have been apprehended or placed into removal proceedings, contact the Law Enforcement Support

Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q10: Does this process apply to me if I am currently in removal proceedings, have a final removal order, or have a voluntary departure order?

A10: This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention).

Q11: If I am not in removal proceedings but believe I meet the guidelines for consideration of DACA, should I seek to place myself into removal proceedings through encounters with CBP or ICE?

A11: No. If you are not in removal proceedings but believe that you meet the guidelines, you should submit your DACA request to USCIS under the process outlined below.

Q12: Can I request consideration of DACA from USCIS if I am in immigration detention under the custody of ICE?

A12: No. If you are currently in immigration detention, you may not request consideration of DACA from USCIS. If you think you may meet the guidelines of this process, you should identify yourself to your deportation officer or Jail Liaison. You may also con-

tact the ICE Field Office Director. For more information, visit ICE's website at www.ice.gov/daca.

Q13: If I am about to be removed by ICE and believe that I meet the guidelines for consideration of DACA, what steps should I take to seek review of my case before removal?

A13: If you believe you can demonstrate that you meet the guidelines and are about to be removed, you should immediately contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q14: What should I do if I meet the guidelines of this process and have been issued an ICE detainer following an arrest by a state or local law enforcement officer?

A14: If you meet the guidelines and have been served a detainer, you should immediately contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).

Q15: If I accepted an offer of administrative closure under the case-by-case review process or my case was terminated as part of the case-by-case review process, can I be considered for deferred action under this process?

A15: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you have accepted an offer of administrative closure or termination under the case-by-case review process.

Q16: If I declined an offer of administrative closure under the case-by-case review process, can I be considered for deferred action under this process?

A16: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you declined an offer of administrative closure under the case-by-case review process.

Q17: If my case was reviewed as part of the case-by-case review process but I was not offered administrative closure, can I be considered for deferred action under this process?

A17: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of DACA even if you were not offered administrative closure following review of your case as part of the case-by-case review process.

Q18: Can I request consideration of DACA under this process if I am currently in a nonimmigrant status (e.g. F-1, E-2, H-4) or have Temporary Protected Status (TPS)?

A18: No. You can only request consideration of DACA under this process if you currently have no immigration status and were not in any lawful status on June 15, 2012.

Q19: Will the information I share in my request for consideration of DACA be used for immigration enforcement purposes?

A19: Information provided in this request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Q20: If my case is referred to ICE for immigration enforcement purposes or if I receive an NTA, will information related to my family members and guardians also be referred to ICE for immigration enforcement purposes?

A20: If your case is referred to ICE for purposes of immigration enforcement or you receive an NTA, information related to your family members or guardians that is contained in your request will not be referred to ICE for purposes of immigration enforcement against family members or guardians. However, that information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.

This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Q21: Will USCIS verify documents or statements that I provide in support of a request for DACA?

A21: USCIS has the authority to verify documents, facts, and statements that are provided in support of requests for DACA. USCIS may contact education

institutions, other government agencies, employers, or other entities in order to verify information.

C. Background Checks

Q22: Will USCIS conduct a background check when reviewing my request for consideration of DACA?

A22: Yes. You must undergo biographic and biometric background checks before USCIS will consider your DACA request.

Q23: What do background checks involve?

A23: Background checks involve checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other federal government agencies.

Q24: What steps will USCIS and ICE take if I engage in fraud through the new process?

A24: If you knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to obtain DACA or work authorization through this process, you will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States.

D. After USCIS Makes a Decision

Q25: Can I appeal USCIS' determination?

A25: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of DACA.

You may request a review of your I-821D denial by contacting USCIS' Call Centers at 1-800-375-5283 to have a service request created if you believe that you actually did meet all of the DACA guidelines and you believe that your request was denied due to one of the following errors:

- Denied the request based on abandonment, when you actually responded to an RFE or NOID within the prescribed time;
- Mailed the RFE or NOID to the wrong address although you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before USCIS issued the RFE or NOID;
- Denied the request on the grounds that you did not come to the United States prior to your 16th birthday, but the evidence submitted **at the time of filing** shows that you did arrive before reaching that age;
- Denied the request on the grounds that you were under age 15 at **the time of filing** but not in removal proceedings, while the evidence submitted **at the time of filing** show that you indeed were in removal proceedings when the request was filed;
- Denied the request on the grounds that you were 31 or older as of June 15, 2012, but the evidence submitted **at the time of filing** shows that you were **under the age** of 31 as of June 15, 2012;

- Denied the request on the grounds that you had lawful status on June 15, 2012, but the evidence submitted **at the time of filing** shows that you indeed were in an **unlawful** immigration status on that date;
- Denied the request on the grounds that you were not physically present in the United States on June 15, 2012, and up through the date of filing, but the evidence submitted **at the time of filing** shows that you were, in fact, present;
- Denied the request due to your failure to appear at a USCIS ASC to have your biometrics collected, when you in fact either did appear at a USCIS ASC to have this done or requested prior to the scheduled date of your biometrics appointment to have the appointment rescheduled; or
- Denied the request because you did not pay the filing fees for Form I-765, Application for Employment Authorization, when you actually did pay these fees.

If you believe your request was denied due to any of these administrative errors, you may contact our National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TDD for the hearing impaired). Customer service officers are available Monday – Friday from 8 a.m. – 6 p.m. in each U.S. time zone.

Q26: If USCIS does not exercise deferred action in my case, will I be placed in removal proceedings?

A26: If you have submitted a request for consideration of DACA and USCIS decides not to defer action in your case, USCIS will apply its policy guidance governing the referral of cases to ICE and the issuance of Notices to Appear (NTA). If your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances. For more detailed information on the applicable NTA policy, visit www.uscis.gov/NTA. If after a review of the totality of circumstances USCIS determines to defer action in your case, USCIS will likewise exercise its discretion and will not issue you an NTA.

Q27: Can my deferred action under the DACA process be terminated before it expires?

A27: Yes.

DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.

II. Initial Requests for DACA

Q28: What guidelines must I meet to be considered for deferred action for childhood arrivals (DACA)?

A28: Under the Secretary of Homeland Security's June 15, 2012 memorandum, in order to be considered for DACA, you must submit evidence, including supporting documents, showing that you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA. U.S. Citizenship and Immigration Services (USCIS) retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Q29: How old must I be in order to be considered for deferred action under this process?

A29:

- If you have never been in removal proceedings, or your proceedings have been terminated before your request for consideration of DACA, you must be at least 15 years of age or older at the time of filing and meet the other guidelines.
- If you are in removal proceedings, have a final removal order, or have a voluntary departure order, and are not in immigration detention, you can request consideration of DACA even if you are under the age of 15 at the time of filing and meet the other guidelines.
- In all instances, you must have been under the age of 31 as of June 15, 2012, to be considered for DACA.

Q30: I first came to the United States before I turned 16 years old and have been continuously residing in the United States since at least June 15, 2007. Before I turned 16 years old, however, I left the United States for some period of time before returning and beginning my current period of continuous residence. May I be considered for deferred action under this process?

A30: Yes, but only if you established residence in the United States during the period before you turned 16 years old, as evidenced, for example, by records showing you attended school or worked in the United States during that time, or that you lived in the United States for multiple years during that time. In addition to establishing that you initially resided in the United States before you turned 16 years old, you must also have maintained continuous residence in the United States from June 15, 2007, until the present time to be considered for deferred action under this process.

Q31: To prove my continuous residence in the United States since June 15, 2007, must I provide evidence documenting my presence for every day, or every month, of that period?

A31: To meet the continuous residence guideline, you must submit documentation that shows you have been living in the United States from June 15, 2007, up until the time of your request. You should provide documentation to account for as much of the period as reasonably possible, but there is no requirement that every day or month of that period be specifically accounted for through direct evidence.

It is helpful to USCIS if you can submit evidence of your residence during at least each year of the period. USCIS will review the documentation in its totality to determine whether it is more likely than not that you were continuously residing in the United States for the period since June 15, 2007. Gaps in the documentation as to certain periods may raise doubts as to your continued residence if, for example, the gaps are lengthy or the record otherwise indicates that you may have been outside the United States for a period of time that was not brief, casual or innocent.

If gaps in your documentation raise questions, USCIS may issue a Request for Evidence to allow you to submit additional documentation that supports your claimed continuous residence.

Affidavits may be submitted to explain a gap in the documentation demonstrating that you meet the five-year continuous residence requirement. If you submit affidavits related to the continuous residence requirement, you must submit two or more affidavits, sworn to or affirmed by people other than yourself who have direct personal knowledge of the events and circumstances during the period as to which there is a gap in the documentation. Affidavits may only be used to explain gaps in your continuous residence; they cannot be used as evidence that you meet the entire five-year continuous residence requirement.

Q32: Does "currently in school" refer to the date on which the request for consideration of deferred action is filed?

A32: To be considered "currently in school" under the guidelines, you must be enrolled in school on the date you submit a request for consideration of deferred action under this process.

Q33: Who is considered to be "currently in school" under the guidelines?

A33: To be considered "currently in school" under the guidelines, you must be enrolled in:

- a public, private, or charter elementary school, junior high or middle school, high school, secondary school, alternative program, or homeschool program that meets state requirements;
- an education, literacy, or career training program (including vocational training) that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED

exam or other state-authorized exam (e.g., HiSet or TASC) in the United States.

Such education, literacy, career training programs (including vocational training), or education programs assisting students in obtaining a regular high school diploma or its recognized equivalent under state law, or in passing a GED exam or other state-authorized exam in the United States, include, but are not limited to, programs funded, in whole or in part, by federal, state, county or municipal grants or administered by non-profit organizations. Programs funded by other sources may qualify if they are programs of demonstrated effectiveness.

In assessing whether such programs not funded in whole or in part by federal, state, county or municipal grants or administered by non-profit organizations are of demonstrated effectiveness, USCIS will consider the duration of the program's existence; the program's track record in assisting students in obtaining a regular high school diploma or its recognized equivalent, in passing a GED or other state-authorized exam (e.g., HiSet or TASC), or in placing students in postsecondary education, job training, or employment; and other indicators of the program's overall quality. For individuals seeking to demonstrate that they are "currently in school" through enrollment in such a program, the burden is on the requestor to show the program's demonstrated effectiveness.

Q34: How do I establish that I am currently in school?

A34: Documentation sufficient for you to demonstrate that you are currently in school may include, but is not limited to:

- evidence that you are enrolled in a public, private, or charter elementary school, junior high or middle school, high school or secondary school; alternative program, or homeschool program that meets state requirements; or
- evidence that you are enrolled in an education, literacy, or career training program (including vocational training) that:
    - has a purpose of improving literacy, mathematics, or English, or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; and
    - is funded, in whole or in part, by federal, state, county or municipal grants or is administered by non-profit organizations, or if funded by other sources, is a program of demonstrated effectiveness; or
- evidence that you are enrolled in an education program assisting students in obtaining a high school equivalency diploma or certificate recognized under state law (such as by passing a GED

exam or other such state-authorized exam [for example, HiSet or TASC]), and that the program is funded in whole or in part by federal, state, county or municipal grants or is administered by non-profit organizations or if funded by other sources, is of demonstrated effectiveness.

Such evidence of enrollment may include: acceptance letters, school registration cards, letters from a school or program, transcripts, report cards, or progress reports which may show the name of the school or program, date of enrollment, and current educational or grade level, if relevant.

Q35: What documentation may be sufficient to demonstrate that I have graduated from high school?

A35: Documentation sufficient for you to demonstrate that you have graduated from high school may include, but is not limited to, a high school diploma from a public or private high school or secondary school, a certificate of completion, a certificate of attendance, or an alternate award from a public or private high school or secondary school, or a recognized equivalent of a high school diploma under state law, or a GED certificate or certificate from passing another such state authorized exam (e.g., HiSet or TASC) in the United States.

Q36: What documentation may be sufficient to demonstrate that I have obtained a GED certificate or certificate from passing another such state authorized exam (e.g., HiSet or TASC)?

A36: Documentation may include, but is not limited to, evidence that you have passed a GED exam, or other state-authorized exam (e.g., HiSet or TASC), and, as a result, have received the recognized equivalent of a regular high school diploma under state law.

Q37: If I am enrolled in a literacy or career training program, can I meet the guidelines?

A37: Yes, in certain circumstances. You may meet the guidelines if you are enrolled in an education, literacy, or career training program that has a purpose of improving literacy, mathematics, or English or is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement. Such programs include, but are not limited to, programs funded, in whole or in part, by federal, state, county or municipal grants or administered by non-profit organizations, or if funded by other sources, are programs of demonstrated effectiveness.

Q38: If I am enrolled in an English as a Second Language (ESL) program, can I meet the guidelines?

A38: Yes, in certain circumstances. Enrollment in an ESL program may be used to meet the guidelines if the ESL program is funded in whole or in part by federal, state, county or municipal grants, or adminis-

tered by non-profit organizations, or if funded by other sources is a program of demonstrated effectiveness. You must submit direct documentary evidence that the program is funded in whole or part by federal, state, county or municipal grants, administered by a non-profit organization, or of demonstrated effectiveness.

Q39: Will USCIS consider evidence other than that listed in Chart #1 to show that I have met the education guidelines?

A39: No. Evidence not listed in Chart #1 will not be accepted to establish that you are currently in school, have graduated or obtained a certificate of completion from high school, or have obtained a GED or passed another state-authorized exam (e.g., HiSet or TASC). You must submit any of the documentary evidence listed in Chart #1 to show that you meet the education guidelines.

Q40: Will USCIS consider evidence other than that listed in Chart #1 to show that I have met certain initial guidelines?

A40: Evidence other than those documents listed in Chart #1 may be used to establish the following guidelines and factual showings if available documentary evidence is insufficient or lacking and shows that:

- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;

- You satisfy the continuous residence requirement, as long as you present direct evidence of your continued residence in the United States for a portion of the required period and the circumstantial evidence is used only to fill in gaps in the length of continuous residence demonstrated by the direct evidence; and
- Any travel outside the United States during the period of required continuous presence was brief, casual, and innocent.

However, USCIS will not accept evidence other than the documents listed in Chart #1 as proof of any of the following guidelines to demonstrate that you:

- Were under the age of 31 on June 15, 2012; and
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.

For example, even if you do not have documentary proof of your presence in the United States on June 15, 2012, you may still be able to satisfy the guideline. You may do so by submitting credible documentary evidence that you were present in the United States shortly before and shortly after June 15, 2012, which, under the facts presented, may give rise to an inference of your presence on June 15, 2012 as well. However, evidence other than that listed in Chart #1 will not be accepted to establish that you have graduated

high school. You must submit the designated documentary evidence to satisfy that you meet this guideline.

Chart #1 provides examples of documentation you may submit to demonstrate you meet the initial guidelines for consideration of deferred action under this process. Please see the instructions of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, for additional details of acceptable documentation.

Chart #1 Examples of Documents to Submit to Demonstrate You Meet the Guidelines	
Proof of identity	• Passport or national identity document from your country of origin • Birth certificate with photo identification • School or military ID with photo • Any U.S. government immigration or other document bearing your name and photo
Proof you came to U.S. before your 16th birthday	• Passport with admission stamp • Form I-94/I-95/I-94W • School records from the U.S. schools you have attended • Any Immigration and

	Naturalization Service or DHS document stating your date of entry (Form I-862, Notice to Appear) • Travel records • Hospital or medical records • Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc.) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Birth certificates of children born in the U.S. • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts

	• Tax receipts, insurance policies
Proof of immigration status	• Form I-94/I-95/I-94W with authorized stay expiration date • Final order of exclusion, deportation, or removal issued as of June 15, 2012 • A charging document placing you into removal proceedings
Proof of presence in U.S. on June 15, 2012 Proof you continuously resided in U.S. since June 15, 2007	• Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc.) • School records (letters, report cards, etc.) • Military records (Form DD-214 or NGB Form 22) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Passport entries • Birth certificates of

	children born in the U.S. • Dated bank transactions • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of your education status at the time of requesting consideration of DACA	• School records (transcripts, report cards, etc.) from the school that you are currently attending in the United States showing the name(s) of the school(s) and periods of school attendance and the current educational or grade level • U.S. high school diploma, certificate of completion, or other alternate award • High school equivalency diploma or certificate recognized under state law

	• Evidence that you passed a state-authorized exam, including the GED or other state-authorized exam (for example, HiSet or TASC) in the United States
Proof you are an honorably discharged veteran of the U.S. Armed Forces or the U.S. Coast Guard	• Form DD-214, Certificate of Release or Discharge from Active Duty • NGB Form 22, National Guard Report of Separation and Record of Service • Military personnel records • Military health records

Q41: May I file affidavits as proof that I meet the initial guidelines for consideration of DACA?

A41: Affidavits generally will not be sufficient on their own to demonstrate that you meet the guidelines for USCIS to consider you for DACA. However, affidavits may be used to support meeting the following guidelines only if the documentary evidence available to you is insufficient or lacking:

- Demonstrating that you meet the five year continuous residence requirement; and

- Establishing that departures during the required period of continuous residence were brief, casual and innocent.

If you submit affidavits related to the above criteria, you must submit two or more affidavits, sworn to or affirmed by people other than yourself, who have direct personal knowledge of the events and circumstances. Should USCIS determine that the affidavits are insufficient to overcome the unavailability or the lack of documentary evidence with respect to either of these guidelines, it will issue a Request for Evidence, indicating that further evidence must be submitted to demonstrate that you meet these guidelines.

USCIS will not accept affidavits as proof of satisfying the following guidelines:

- You are currently in school, have graduated or obtained a certificate of completion or other alternate award from high school, have obtained a high school equivalency diploma or certificate (such as by passing the GED exam or other state-authorized exam [for example, HiSet or TASC]), or are an honorably discharged veteran from the Coast Guard or Armed Forces of the United States;
- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;

- You were under the age of 31 on June 15, 2012; and
- Your criminal history, if applicable.

If the only evidence you submit to demonstrate you meet any of the above guidelines is an affidavit, USCIS will issue a Request for Evidence, indicating that you have not demonstrated that you meet these guidelines and that you must do so in order to demonstrate that you meet that guideline.

Q42: Will I be considered to be in unlawful status if I had an application for asylum or cancellation of removal pending before either USCIS or the Executive Office for Immigration Review (EOIR) on June 15, 2012?

A42: Yes. If you had an application for asylum or cancellation of removal, or similar relief, pending before either USCIS or EOIR as of June 15, 2012, but had no lawful status, you may request consideration of DACA.

Q43: I was admitted for "duration of status" or for a period of time that extended past June 14, 2012, but violated my immigration status (e.g., by engaging in unauthorized employment, failing to report to my employer, or failing to pursue a full course of study) before June 15, 2012. May I be considered for deferred action under this process?

A43: No, unless the Executive Office for Immigration Review terminated your status by issuing a final order of removal against you before June 15, 2012.

Q44: I was admitted for "duration of status" or for a period of time that extended past June 14, 2012 but "aged out" of my dependent nonimmigrant status as of June 15, 2012. May I be considered for deferred action under this process?

A44: Yes. For purposes of satisfying the "had no lawful status on June 15, 2012," guideline alone, if you were admitted for "duration of status" or for a period of time that extended past June 14, 2012 but "aged out" of your dependent nonimmigrant status, on or before June 15, 2012, (meaning you turned 21 years old on or before June 15, 2012), you may be considered for deferred action under this process.

Q45: I was admitted for "duration of status" but my status in SEVIS is listed as terminated on or before June 15, 2012. May I be considered for deferred action under this process?

A45: Yes. For the purposes of satisfying the ""had no lawful status on June 15, 2012," guideline alone, if your status as of June 15, 2012, is listed as "terminated" in SEVIS, you may be considered for deferred action under this process.

Q46: I am a Canadian citizen who was inspected by CBP but was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

A46: In general, a Canadian citizen who was admitted as a visitor for business or pleasure and not issued an I-94, Arrival/Departure Record, (also known as a "non-

controlled" Canadian nonimmigrant) is lawfully admitted for a period of six months. For that reason, unless there is evidence, including verifiable evidence provided by the individual, that he or she was specifically advised that his or her admission would be for a different length of time, the Department of Homeland Security (DHS) will consider for DACA purposes only, that the alien was lawfully admitted for a period of six months. Therefore, if DHS is able to verify from its records that your last non-controlled entry occurred on or before Dec. 14, 2011, DHS will consider your nonimmigrant visitor status to have expired as of June 15, 2012 and you may be considered for deferred action under this process.

Q47: I used my Border Crossing Card (BCC) to obtain admission to the United States and was not issued an I-94 at the time of admission. May I be considered for deferred action under this process?

A47: Because the limitations on entry for a BCC holder vary based on location of admission and travel, DHS will assume that the BCC holder who was not provided an I-94 was admitted for the longest period legally possible—30 days—unless the individual can demonstrate, through verifiable evidence, that he or she was specifically advised that his or her admission would be for a different length of time. Accordingly, if DHS is able to verify from its records that your last admission was using a BCC, you were not issued an I-94 at the time of admission, and it occurred on or before May 14, 2012, DHS will consider your nonim-

migrant visitor status to have expired as of June 15, 2012, and you may be considered for deferred action under this process.

Q48: Do I accrue unlawful presence if I have a pending initial request for consideration of DACA?

A48: You will continue to accrue unlawful presence while the request for consideration of DACA is pending unless you are under 18 years of age at the time of the request. If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS. If action on your case is deferred, you will not accrue unlawful presence during the period of deferred action. However, having action deferred on your case will not excuse previously accrued unlawful presence.

III. Renewal of DACA

Q49: When should I file my renewal request with U.S. Citizenship and Immigration Services (USCIS)?

A49: USCIS strongly encourages you to submit your Deferred Action for Childhood Arrivals (DACA) renewal request between 150 days and 120 days before the expiration date located on your current Form I-797 DACA approval notice and Employment Authorization Document (EAD). Filing during this window will minimize the possibility that your current period of DACA will expire before you receive a decision on your renewal request. If you have filed your renewal request at least 120 days before your deferred action ex-

pires and USCIS is delayed in processing your renewal request, USCIS may provide you with DACA and employment authorization for up to an additional 120 days.

USCIS' current goal is to process DACA renewal requests within 120 days. However, you may submit an inquiry about the status of your renewal request after it has been pending more than 105 days. To submit an inquiry online, please visit https://egov.uscis.gov/e-request.

Please Note: USCIS will not provide any such short-term deferred action and employment authorization when USCIS is delayed in reaching a final decision on your renewal request because, for example: 1) of factors within your control (such as failure to file the renewal request within the suggested timeframe or filing an incomplete renewal request); 2) additional time is needed to resolve issues with background or security checks in your case; and/or 3) your renewal submission contained evidence that you may not satisfy the DACA renewal guidelines and USCIS must send you a request for additional information or explanation.

Q50: Can I file a renewal request outside the recommended filing period of 150 days to 120 days before my current DACA expires?

A50: Yes, you may submit your renewal request outside of the recommended filing window.

However:

- If you file before the recommended filing window (meaning more than 150 days before your current period of DACA expires), USCIS may reject your submission and return it to you with instructions to resubmit your request within the recommended filing period.
- If you file after the recommended filing period (meaning less than 120 days before your current period of DACA expires), USCIS will not consider providing you with any additional short-term period of deferred action and employment authorization before reaching a final decision on your renewal request. This will be true even if your current period of DACA expires while USCIS is considering your renewal request.

If you file after your most recent DACA period expired, but within one year of its expiration, you may submit a request to renew your DACA. If you are filing beyond one year after your most recent period of DACA expired, you may still request DACA by submitting a new initial request.

Q51: How will USCIS evaluate my request for renewal of DACA:

A51: You may be considered for renewal of DACA if you met the guidelines for consideration of Initial DACA (see above) AND you:

1. Did not depart the United States on or after Aug. 15, 2012, without advance parole;

2. Have continuously resided in the United States since you submitted your most recent request for DACA that was approved up to the present time; and

3. Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of DACA renewal. USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met.

Q512 Do I accrue unlawful presence if I am seeking renewal and my previous period of DACA expires before I receive a renewal of deferred action under DACA? Similarly, what would happen to my work authorization?

A52: Yes, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request.

Similarly, if your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will not be authorized to work in the United States regardless of your age at time of filing until

and unless you receive a new employment authorization document from USCIS.

However, if you have filed your renewal request with USCIS approximately 120 days before your deferred action and EAD expire and USCIS is unexpectedly delayed in processing your renewal request, USCIS may provide deferred action and employment authorization for a short period of time.

Q53. Do I need to provide additional documents when I request renewal of deferred action under DACA?

A53. No, unless you have *new* documents pertaining to removal proceedings or criminal history that you have not already submitted to USCIS in a previously approved DACA request. USCIS, however, reserves the authority to request at its discretion additional documents, information or statements relating to a DACA renewal request determination.

CAUTION: If you knowingly and willfully provide materially false information on Form I-821D, you will be committing a federal felony punishable by a fine, or imprisonment up to five years, or both, under 18 U.S.C. Section 1001. In addition, individuals may be placed into removal proceedings, face severe penalties provided by law, and be subject to criminal prosecution.

Q54. If I am no longer in school, can I still request to renew my DACA?

A54. Yes. Neither Form I-821D nor the instructions ask renewal requestors for information about continued school enrollment or graduation. The instructions for renewal requests specify that you may be considered for DACA renewal if you met the guidelines for consideration of initial DACA, including the educational guidelines and:

1. Did not depart the United States on or after August 15, 2012, without advance parole;
2. Dave continuously resided in the United States, up to the present time, since you submitted your most recent request for DACA that was approved; and
3. Have not been convicted of a felony, a significant misdemeanor or three or more misdemeanors, and are not a threat to national security or public safety.

Q55. If I initially received DACA and was under the age of 31 on June 15, 2012, but have since become 31 or older, can I still request a DACA renewal?

A55. Yes. You may request consideration for a renewal of DACA as long as you were under the age of 31 as of June 15, 2012.

IV. Travel

Q56: May I travel outside of the United States before I submit an initial Deferred Action for Childhood Arrivals (DACA) request or while my initial DACA request remains pending with the Department of Homeland Security (DHS)?

A56: Any unauthorized travel outside of the United States on or after Aug. 15, 2012, will interrupt your continuous residence and you will not be considered for deferred action under this process. Any travel outside of the United States that occurred on or after June 15, 2007, but before Aug. 15, 2012, will be assessed by U.S. Citizenship and Immigration Services (USCIS) to determine whether the travel qualifies as brief, casual and innocent. (See Chart #2.)

CAUTION: You should be aware that if you have been ordered deported or removed, and you then leave the United States, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.

Q57: If my case is deferred under DACA, will I be able to travel outside of the United States?

A57: Not automatically. If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a Form I-131, Application for Travel Document and paying the applicable fee ($360). USCIS will determine whether your purpose for international travel is justifiable based on the circum-

stances you describe in your request. Generally, USCIS will only grant advance parole if your travel abroad will be in furtherance of:

- humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;
- educational purposes, such as semester-abroad programs and academic research, or;
- employment purposes such as overseas assignments, interviews, conferences or, training, or meetings with clients overseas.

Travel for vacation is not a valid basis for advance parole.

You may not apply for advance parole unless and until USCIS defers action in your case under the consideration of DACA. You cannot apply for advance parole at the same time as you submit your request for consideration of DACA. All advance parole requests will be considered on a case-by-case basis.

If USCIS has deferred action in your case under the DACA process after you have been ordered deported or removed, you may still request advance parole if you meet the guidelines for advance parole described above.

CAUTION: However, for those individuals who have been ordered deported or removed, before you actually leave the United States, you should seek to reopen

your case before the Executive Office for Immigration Review (EOIR) and obtain administrative closure or termination of your removal proceeding. Even after you have asked EOIR to reopen your case, you should not leave the United States until after EOIR has granted your request. If you depart after being ordered deported or removed, and your removal proceeding has not been reopened and administratively closed or terminated, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences. If you have any questions about this process, you may contact U.S. Immigration and Customs Enforcement (ICE) through the local ICE Office of the Chief Counsel with jurisdiction over your case.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

Q58: Do brief departures from the United States interrupt the continuous residence requirement?

A58: A brief, casual and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;

2. The absence was not because of an order of exclusion, deportation or removal;

3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation or removal proceedings; and

4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

Once USCIS has approved your request for DACA, you may file Form I-131, Application for Travel Document, to request advance parole to travel outside of the United States.

CAUTION: If you travel outside the United States on or after Aug. 15, 2012, without first receiving advance parole, your departure automatically terminates your deferred action under DACA.

Travel Guidelines (Chart #2)

Travel Dates	Type of Travel	Does It Affect Continuous Residence
On or after June 15, 2007, but before Aug. 15, 2012	Brief, casual and innocent	No
	For an extended time	Yes
	Because of an order of exclusion, deportation, voluntary departure, or removal	
	To participate in criminal activity	
On or after Aug. 15, 2012, and before you have requested deferred action	Any	Yes. You cannot apply for advance parole unless and until DHS has determined whether to defer action in your case and you cannot travel until you receive advance parole. In addition, if you have previously been ordered deported and removed and you depart the United States without taking additional steps to address

		your removal proceedings, your departure will likely result in your being considered deported or removed, with potentially serious future immigration consequences.
On or after Aug. 15, 2012, and after you have requested deferred action	Any	
On or after Aug. 15, 2012 and after receiving DACA	Any	It depends. If you travel after receiving advance parole, the travel will not interrupt your continuous residence. However, if you travel without receiving advance parole, the travel *will* interrupt your continuous residence.

Q59: May I file a request for advance parole concurrently with my DACA package?

A59: Concurrent filing of advance parole is not an option at this time. DHS is, however, reviewing its policy on concurrent filing of advance parole with a DACA request. In addition, DHS is also reviewing eligibility criteria for advance parole. If any changes to this policy are made, USCIS will update this FAQ and inform the public accordingly.

V. Criminal Convictions

Q60: If I have a conviction for a felony offense, a significant misdemeanor offense, or multiple misdemeanors, can I receive an exercise of prosecutorial discretion under this new process?

A60: No. If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for Deferred Action for Childhood Arrivals (DACA) except where the Department of Homeland Security (DHS) determines there are exceptional circumstances.

Q61: What offenses qualify as a felony?

A61: A felony is a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.

Q62: What offenses constitute a significant misdemeanor?

A62: For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or,

2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by U.S. Immigration and Customs Enforcement (ICE). Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion. DHS retains the discretion to determine that an individual does not warrant de-

ferred action on the basis of a single criminal offense for which the individual was sentenced to time in custody of 90 days or less.

Q63: What offenses constitute a non-significant misdemeanor?

A63: For purposes of this process, a non-significant misdemeanor is any misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Is not an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; and
2. Is one for which the individual was sentenced to time in custody of 90 days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.

Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion.

Q64: If I have a minor traffic offense, such as driving without a license, will it be considered a non-significant misdemeanor that counts towards the "three or more non-significant misdemeanors" making me unable to receive consideration for an exercise of prosecutorial discretion under this new process?

A64: A minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion.

It is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed.

Q65: What qualifies as a national security or public safety threat?

A65: If the background check or other information uncovered during the review of your request for deferred action indicates that your presence in the United States threatens public safety or national security, you will not be able to receive consideration for an exercise of prosecutorial discretion except where DHS determines there are exceptional circumstances. Indicators that you pose such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.

Q66: Will offenses criminalized as felonies or misdemeanors by state immigration laws be considered felonies or misdemeanors for purpose of this process?

A66: No. Immigration-related offenses characterized as felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors for the purpose of considering a request for consideration of deferred action under this process.

Q67: Will DHS consider my expunged or juvenile conviction as an offense making me unable to receive an exercise of prosecutorial discretion?

A67: Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. If you were a juvenile, but tried and convicted as an adult, you will be treated as an adult for purposes of the DACA process.

VI. Miscellaneous

Q68: Does this Administration remain committed to comprehensive immigration reform?

A68: Yes. The Administration has consistently pressed for passage of comprehensive immigration reform, including the DREAM Act, because the President believes these steps are critical to building a 21st century immigration system that meets our nation's economic and security needs.

Q69: Is passage of the DREAM Act still necessary in light of the new process?

A69: Yes. The Secretary of Homeland Security's June 15, 2012, memorandum allowing certain people to request consideration for deferred action is one in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred Action for Childhood Arrivals (DACA) is an exercise of prosecutorial discretion and does not provide lawful status or a pathway to citizenship. As the President has stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.

Q70: Does deferred action provide me with a path to permanent resident status or citizenship?

A70: No. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.

Q71: Can I be considered for deferred action even if I do not meet the guidelines to be considered for DACA?

A71: This process is only for individuals who meet the specific guidelines for DACA. Other individuals may, on a case-by-case basis, request deferred action from U.S. Citizenship and Immigration Services (USCIS) or

U.S. Immigration and Customs Enforcement (ICE) in certain circumstances, consistent with longstanding practice.

Q72: How will ICE and USCIS handle cases involving individuals who do not satisfy the guidelines of this process but believe they may warrant an exercise of prosecutorial discretion under the June 2011 Prosecutorial Discretion Memoranda?

A72: If USCIS determines that you do not satisfy the guidelines or otherwise determines you do not warrant an exercise of prosecutorial discretion, then it will decline to defer action in your case. If you are currently in removal proceedings, have a final order, or have a voluntary departure order, you may then request ICE consider whether to exercise prosecutorial discretion.

Q73: How should I fill out question 9 on Form I-765, Application for Employment Authorization?

A73. When you are filing a Form I-765 as part of a DACA request, question 9 is asking you to list those Social Security numbers that were officially issued to you by the Social Security Administration.

Q74: Will there be supervisory review of decisions by USCIS under this process?

A74: Yes. USCIS has implemented a successful supervisory review process to ensure a consistent process for considering requests for DACA.

Q72: Will USCIS personnel responsible for reviewing requests for DACA receive special training?

A72: Yes. USCIS personnel responsible for considering requests for consideration of DACA have received special training.

Q75: Must attorneys and accredited representatives who provide pro bono services to deferred action requestors at group assistance events file a Form G-28 with USCIS?

A75: Under 8 C.F.R. §§ 292.3 and 1003.102, practitioners are required to file a Notice of Entry of Appearance as Attorney or Accredited Representative when they engage in practice in immigration matters before DHS, either in person or through the preparation or filing of any brief, application, petition, or other document. Under these rules, a practitioner who consistently violates the requirement to file a Form G-28 may be subject to disciplinary sanctions; however on Feb. 28, 2011, USCIS issued a statement indicating that it does not intend to initiate disciplinary proceedings against practitioners (attorneys and accredited representatives) based solely on the failure to submit a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) in relation to pro bono services provided at group assistance events. DHS is in the process of issuing a final rule at which time this matter will be reevaluated.

Q76: When must an individual sign a Form I-821D as a preparer?

A77: Anytime someone other than the requestor prepares or helps fill out the Form I-821D, that individual must complete Part 5 of the form.

Q78: If I provide my employee with information regarding his or her employment to support a request for consideration of DACA, will that information be used for immigration enforcement purposes against me and/or my company?

A78: You may, as you determine appropriate, provide individuals requesting DACA with documentation which verifies their employment. This information will not be shared with ICE for civil immigration enforcement purposes under section 274A of the Immigration and Nationality Act (relating to unlawful employment) unless there is evidence of egregious violations of criminal statutes or widespread abuses.

Q79: Can I request consideration for deferred action under this process if I live in the Commonwealth of the Northern Mariana Islands (CNMI)?

A79: Yes, in certain circumstances. The CNMI is part of the United States for immigration purposes and is not excluded from this process. However, because of the specific guidelines for consideration of DACA, individuals who have been residents of the CNMI are in most cases unlikely to qualify for the program. You must, among other things, have come to the United States before your 16th birthday and

have resided continuously in the United States since June 15, 2007.

Under the Consolidated Natural Resources Act of 2008, the CNMI became part of the United States for purposes of immigration law only on Nov. 28, 2009. Therefore entry into, or residence in, the CNMI before that date is not entry into, or residence in, the United States for purposes of the DACA process.

USCIS has used parole authority in a variety of situations in the CNMI to address particular humanitarian needs on a case-by-case basis since Nov. 28, 2009. If you live in the CNMI and believe that you meet the guidelines for consideration of deferred action under this process, except that your entry and/or residence to the CNMI took place entirely or in part before Nov. 28, 2009, USCIS is willing to consider your situation on a case-by-case basis for a grant of parole. If this situation applies to you, you should make an appointment through INFOPASS with the USCIS ASC in Saipan to discuss your case with an immigration officer.

Q80: Someone told me if I pay them a fee, they can expedite my DACA request. Is this true?

A80: No. There is no expedited processing for deferred action. Dishonest practitioners may promise to provide you with faster services if you pay them a fee. These people are trying to scam you and take your money. Visit our Avoid Scams page to learn how you can protect yourself from immigration scams.

Make sure you seek information about requests for consideration of DACA from official government sources such as USCIS or the DHS. If you are seeking legal advice, visit our Find Legal Services page to learn how to choose a licensed attorney or accredited representative.

Q81: Am I required to register with the Selective Service?

A81: Most male persons residing in the U.S., who are ages 18 through 25, are required to register with Selective Service. Please see link for more information. [Selective Service].

Last Reviewed/Updated: 12/04/2014

Sept. 26, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[SEAL OMITTED] U.S. Citizenship and Immigration Services

[REDACTED]

[REDACTED]

RE: I-821 D. Deferred Action for Childhood Arrivals

[REDACTED]

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details
Your response must be received in this office by December 19, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record: or
3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence**. Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits, sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

GRADUATED FROM SCHOOL

The evidence you submitted with your Form I-821D, Consideration of Deferred Action for Childhood Arrivals, to show that you graduated or received a certificate of completion from a U.S. High School, public or private college, or university or community college, or have obtained a General Educational Development (GED) Certificate in the United States or equivalent under State law is insufficient. You did not submit a copy of your diploma showing you have graduated. You may still submit evidence, which may include, but is not limited to, copies of:

- A high school diploma from a public or private high school or secondary school;
- A recognized equivalent of a high school diploma under state law, including a General Education Development (GED) certificate, a certificate of completion, or a certificate of attendance;
- A transcript that identifies the date of graduation or program completion;
- An enrollment history that shows the date of graduation or program completion;
- A degree from a public or private college or university or community college; or
- An alternate award from a public or private high school or secondary school.

Documentation sufficient to demonstrate that you obtained a GED includes, but is not limited to, evi-

dence you passed a GED exam, or other comparable State-authorized exam, and, as a result, you received the recognized equivalent of a regular high school diploma under State law.

SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application Support Center. Your criminal history check has revealed that you were arrested on [**REDACTED**] in Wenatchee, WA and charged with Driving Under the Influence.

At this time you must provide a **final** certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

/s/ MARK J. HAZUDA
MARK J. HAZUDA
Director
Officer: [REDACTED]

[COPY]

June 27, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[SEAL OMITTED] U.S. Citizenship and Immigration Services

[REDACTED]

[REDACTED]

RE: I-821 D. Deferred Action for Childhood Arrivals

[REDACTED]

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details
Your response must be received in this office by September 19, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record: or

3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence.** Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits,

sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

CONTINUOUS RESIDENCE

The evidence you submitted with your Form I-821 D, Consideration of Deferred Action for Childhood Arrivals, to establish that you have continuously resided in the United States during the 5-year period immediately before June 15, 2012, and up to the time of filing is insufficient because no evidence was submitted for 2014.

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self employed, letters from banks and other firms with whom you have done business);

   NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

   Such letters must include: (1) your address(es) at the time of employment; (2) the exact period(s) of employment; (3) period(s) of layoff; and (4) duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service;

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance;

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records);

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the medical facility or physician and the date(s) of the treatment or hospitalization;

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.);

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, rental agreements, contracts to which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

ANSWERED "NO" TO QUESTIONS 1 AND 2 IN PART 3—USCIS FOUND CLEAR CHARGES OR OTHER DEROGATORY INFORMATION, SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application Support Center. Your background check revealed that you were arrested on [**REDACTED**] in Albuquerque, NM and charged with POSSESSION OF A CONTROLLED SUBSTANCE.

At this time you must provide a certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

/s/ MARK J. HAZUDA
MARK J. HAZUDA
Director
Officer: **[REDACTED]**

Aug. 13, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[SEAL OMITTED] U.S. Citizenship and Immigration Services

[REDACTED]

[REDACTED] **[REDACTED]**

[REDACTED]

RE: **[REDACTED]**

I-821 D. Deferred Action for Childhood Arrivals

[REDACTED]

REQUEST FOR EVIDENCE

The documentation submitted is not sufficient to warrant favorable consideration of your request.

See Letter for Details
Your response must be received in this office by November 5, 2014

Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or

3. Withdraw the request. (Please note that if the request is withdrawn, the filing fee cannot be refunded.)

You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based on the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied. If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

If you submit a document in any language other than English, it must be accompanied by a full **complete** English translation. The translator must certify the translation is accurate and he or she is competent to translate. Note: You must submit the requested foreign language document along with the translation.

For deferred action for childhood arrivals, **affidavits or sworn statements generally are not satisfactory evidence**. Affidavits will only be considered as evidence in two situations: 1. When there is a shortcoming in documentation to explain brief, casual, and innocent departures during the period of continuous residence in the United States; and 2. To explain a minor gap in documentation showing you meet the continuous residence requirement. If you submit affidavits for these two reasons, you should provide two or more affidavits,

sworn to or affirmed by people other than yourself who have direct, personal knowledge of the information.

IDENTITY

No evidence was submitted with your Form 1-821D, Consideration of Deferred Action for Childhood Arrivals, to prove your identity. You may still submit evidence, which may include, but is not limited to, copies of:

- Passport;
- Birth certificate accompanied by photo identification;
- Any national identity documents from your country of origin bearing your photo and/or fingerprint;
- Any U.S.-government immigration or other document bearing your name and photograph (e.g., Employment Authorization Documents (EADs), expired visas, driver's licenses, non-driver cards, etc.);
- Any school-issued form of identification with photo;
- Military identification document with photo;
- State issued photo ID showing date of birth; or
- Any other document that you believe is relevant.

Expired documents are acceptable.

CONTINUOUS RESIDENCE

The evidence you submitted with your Form 1-821D, Consideration of Deferred Action for Childhood Arrivals, to establish that you have continuously resided in the United States during the 5-year period immediately be-

fore June 15, 2012, and up to the time of filing is insufficient. You have submitted sufficient evidence to document your residency in the United States for 2007, 2008, 2010 and 2013. You submitted a account statements as evidence of your residence in the United States for the years 2009, 2011, 2012. However, these documents are insufficient as evidence of your residency for those years. Additionally, no evidence was submitted for 2014. You may still submit evidence, which may include, but is not limited to, copies of:

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self employed, letters from banks and other firms with whom you have done business);

   NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

   Such letters must include: (1) your address(es) at the time of employment; (2) the exact period(s) of employment; (3) period(s) of layoff; and (4) duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service;

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance;

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Fonn 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records);

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the medical facility or physician and the date(s) of the treatment or hospitalization;

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.);

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, rental agreements, contracts to

which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

PROOF OF PRESENCE IN THE UNITED STATES ON JUNE 15, 2012

The evidence you submitted with your Form 1-821D, Consideration of Deferred Action for Childhood Arrivals, to show that you were present in the United States on June 15, 2012 is insufficient. You submitted copies of account statements for 2012. However, the account statements you submitted for 2012 do not contain sufficient information to verify that you were physically present in the U.S. on June 15, You may still submit evidence, which may include, but is not limited to, copies of:

a. Employment records (e.g., pay stubs, W-2 Forms, certification of the filing of Federal income tax returns, State verification of the filing of state income tax returns, letters from employer(s), or, if you are self-employed, letters from banks and other firms with whom you have done business).

NOTE: In all of these documents, your name and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers must be signed by the employer and must include the employer's contact information.

Such letters must include: (1) your address(es) at the time of employment; (2) the exact period(s) of employment; (3) period(s) of layoff; and (4) duties with the company.

b. Rent receipts, utility bills (gas, electric, phone, etc.), receipts or letters from companies showing the dates during which you received service.

c. School records (transcripts, letters, report cards, etc.) from the schools that you have attended in the United States, showing the name(s) of the schools and periods of school attendance.

d. Military records (e.g., Form DD-214, Certificate of Release or Discharge from Active Duty; NGB Form 22, National Guard Report of Separation and Record of Service; military personnel records; or military health records).

e. Hospital or medical records concerning treatment or hospitalization, showing the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

f. Official records from a religious entity in the United States confirming your participation in a religious ceremony, rite, or passage (e.g., baptism, first communion, wedding, etc.).

g. Money order receipts for money sent into or out of the country; passport entries; birth certificates of children born in the United States; dated bank transactions; correspondence between you and another person or organization; U.S. Social Security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, contracts to which you have been a party; tax receipts; insurance policies; receipts; postmarked letters; or

h. Any other relevant document.

SUBMIT JUDGMENT AND CONVICTION DOCUMENTS

A background check has been conducted based upon the fingerprints you provided at the Application Support Center. Your criminal history check has revealed that you were arrested for the following:

- Arrested [**REDACTED**] in McAllan Texas and charged with False Report to Police Officer/Law Enforce Empl (37.08 PC).

At this time you must provide a certified court disposition, arrest record, charging document, sentencing record, etc. for each arrest, unless disclosure is prohibited under state law within the United States. If you are unable to provide such records because your case was expunged or sealed, you must provide information about your arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. The charge and disposition of each arrest must be specifically identified (not just numeric citations or codes). Additionally, if you were convicted, you may submit a copy of the pertinent statute, sentencing guide, or statement from the court clerk or police department identifying the statute under which you were convicted and the sentence you received.

If you fail to submit such evidence, USCIS may deny your request for consideration of deferred action for childhood arrivals.

PLACE THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL. PLEASE USE THE ENCLOSED ENVELOPE TO MAIL THE ADDITIONAL EVIDENCE REQUESTED BACK TO THIS OFFICE.

Sincerely,

/s/ MARK J. HAZUDA
MARK J. HAZUDA
Director
Officer: [REDACTED]

June 10, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[SEAL OMITTED] U.S. Citizenship and Immigration Services

[REDACTED]

[REDACTED]

RE: **[REDACTED]**

I-821D, Deferred Action for Childhood Arrivals

[REDACTED]

NOTICE OF INTENT TO DENY

USCIS has reviewed your request for consideration of deferred action for childhood arrivals.

In order to be considered for deferred action as a childhood arrival, you are to demonstrate that you warrant the favorable exercise of prosecutorial discretion.

According to the information provided with your request, and/or based on information obtained during routine systems checks, it appears that you have a record of juvenile delinquency.

The record indicates that you committed the following offense(s) as a minor.

- On **[REDACTED]** at the age of 16 you committed Robbery and Grand Theft, in violation of

PC 211 and PC 487. Your case was adjudicated as a juvenile delinquency at Los Angeles CA.

While a finding of juvenile delinquency is not considered a criminal conviction for purposes of deferred action, given the seriousness of your offense, USCIS has determined that you do not merit a favorable exercise of discretion.

Accordingly, USCIS intends to deny your request for consideration for deferred action for childhood arrivals. You are afforded thirty-three (33) days from the date of this notice of intent to deny to submit additional information, evidence, or arguments overcoming the grounds for the intended denial. Failure to respond to this notice of intent to deny will result in the denial of your request for consideration of deferred action for childhood arrivals.

Sincerely,

/s/ MARK J. HAZUDA
MARK J. HAZUDA
Director
Officer: [REDACTED]

Sept. 12, 2014

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

[SEAL OMITTED] U.S. Citizenship and Immigration Services

[REDACTED]

[REDACTED]

RE: **[REDACTED]**
I-821 D. Deferred Action for Childhood Arrivals

[REDACTED]

NOTICE OF INTENT TO DENY

USCIS has reviewed your request for consideration of deferred action for childhood arrivals.

In order to be considered for deferred action for childhood arrivals, you are to demonstrate that you have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

According to the information provided with your request. and/or based on information obtained during routine systems checks, it appears that you pose a threat to public safety because you committed multiple felonies as a juvenile and have been involved in the sale of illegal drugs.

Furthermore, based on the totality of the circumstances, it does not appear that you warrant a favorable exercise or prosecutorial discretion.

Accordingly, USCIS intends to deny your request for consideration for deferred action for childhood arrivals. You are afforded thirty-three (33) days from the date of this notice of intent to deny to submit additional information, evidence, or arguments overcoming the grounds for the intended denial. Failure to respond to this notice of intent to deny will result in the denial of your request for consideration of deferred action for childhood arrivals.

/s/ MARK J. HAZUDA
MARK J. HAZUDA
Director
Officer: [REDACTED]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529

[SEAL OMITTED] **U.S. Citizenship and Immigration Services**

U.S. Citizenship & Immigration Services
Deferred Action for Childhood Arrivals
Receipts, Rejections, Approvals, Denials, NOIDs, and RFEs from August 15, 2012 -December 31, 2014

Type of Filing	Receipts	Rejections	Approvals	Denials	NOIDs	RFEs
Initials	727,164	43,174	638,897	38,597	6,496	188,767
Renewals	234,991	12,648	148,171	71	117	2,685
Grand Total	**962,155**	**55,822**	**787,068**	**38,668**	**6,613**	**191,452**

Please note:

1) *The report reflects the most up-to-date data available at the time the report is generated.*

2) *The duplicates and rejected cases have been removed.*

Database Queried January 6, 2015

Report Created: January 29 2015

System: CIS Consolidated Operational Repository (CISCOR)

By: Office of Performance and Quality (OPQ), Performance Analysis & External Reporting (PAER), DL

Parameter

Date: *Receipts, Approvals, Denials, Rejections, Requests for Evidence, Notice of Intent to Deny* from 08/15/2012 to 01/23/2015

Form Type(s): *I-821D*

U.S. Citizenship and Immigration Services
Form I-765, Application for Employment Authorization
Class Preference C33 (Deferred Action for Childhood Arrivals)
Receipts and Approvals
Fiscal Years 2012- 2014 (December)

Count	Receipts	Approvals
Total	970,735	825,640

Please note:

1) The report reflects the most up-to-date data available at the time the report is generated.

2) The Rejections and duplicates have been removed.

Report Created: January 28, 2015

System: CIS Consolidated Operational Repository (CISCOR)

By: Office of Performance and Quality (OPQ), Performance Analysis & External Reporting (PAER), DL

Parameters:

Date: Fiscal Years 2012-2014 (December 31)

Form Type: I-765, Class Preference C33

Data Type: Receipts, Approvals

Feb. 8, 1990

Decision Memo

To: Gene McNary, Commissioner

Subject: The implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the spouses and children of legalized aliens (section 245a and section 210).

The family fairness policy provides voluntary departure and employment authorization to potentially millions of individuals. The Service must establish specific procedures to ensure consistency of processing requests for voluntary departure and employment authorization from ineligible family members of temporary resident aliens legalized under the legalization (section 245a) and special agricultural (section 210) programs. The following processing options are submitted for consideration.

Traditional processing pursuant to 8 CFR 242.5 (voluntary departure) and 8 CFR 274a.12 (employment authorization).

- request for voluntary departure will be made in writing to the district director in whose jurisdiction the ineligible spouse or child resides.

- the district's records section will create an A-file, if a file has not been previously opened.

- the district's investigations section will prepare form I-213, "Record of Deportable Alien" for each ineligible spouse or child, a determination will be

made to grant or deny voluntary departure, and the aliens will be placed under docket control.

o the district's deportation section will control both granted and denied cases that have been placed under docket control. One year call-ups will be maintained for granted cases. Requests for extensions will be processed by deportation personnel. Denied cases will be processed for Orders to Show Cause if the alien has not departed the United States within the required time frame.

o application for employment authorization will be made on form I-765, "Application for Employment Authorization", with fee.

PROS

o follows established regulatory procedures and guidelines.

o utilizes personnel experienced in processing requests for voluntary departure, employment authorization, and file creation.

o does not "link" to legalization's promise of confidentiality and "no risk" if alien comes forward to request voluntary departure. (alien can be denied and placed into deportation proceedings, etc.)

o does not impact on legalization processing, thus complying with Congressional intent for a temporary legalization program that will continue to phase down (adjudicating the remaining 700,000+ Phase I 245a and 210 cases, the remaining 800,000

Phase II 245a cases, replacement card applications, processing the 60,000 ongoing litigation cases etc.)

- allows for maximum use of district director's exercise of discretion.

CONS

- places large workload on in place INS structure, that will strain existing resources.

- jeopardizes the Regional Commissioners and the District Directors performance goals in other operational activities.

- operational budgets do not contain sufficient funds for this effort. (a "user fee" may have to be charged generating negative publicity and charges that the Service's policy was a ruse to raise money)

- large numbers of individuals will visit in place INS offices that already experience unacceptable crowds and long waiting times. (Again, the risk of negative publicity is great)

- congressional complaints are likely to increase as resources are diverted from other activities, slowing the disbursement of benefits and services associated with these activities)

- the morale of personnel in investigations and deportation is likely to suffer in that the perception of this program will not "fit" with their regular

mission assignments. (Low morale can translate into inadequate processing and poor service and consequently reflecting badly on the Service)

- not an efficient way to consistently process large numbers.

DRAFT PROCESSING PLAN
RPF PROCESSING OF FAMILY FAIRNESS APPLICATIONS
UTILIZING DIRECT MAIL PROCEDURES

Feb. 8, 1990

This proposal identifies one feasible method for accomplishing the initial receipt of documents required for an alien to request coverage under the Service's recently announced policy shift on family fairness. As a result of this change in policy, current estimates are that greater than one million IRCA-ineligible family members will file for this benefit.

Because of the anticipated scope of this workload on the Service, it is advisable to identify cost-efficient and effective methods to receive and process applications for inclusion under the Family Fairness Policy (FFP). Therefore, it is recommended that one viable option will incorporate many of the resources currently in place throughout the Service. One such plan, which can be activated with a minimum lead time and effort is to have aliens direct mail their applications to Service Regional Processing Facilities (RPF).

ALIEN MUST FILE BY MAIL WITH THEIR RPF:

1. One Form I-765, Application for Employment Authorization

   - Instructions are modified for this form to tell aliens to enter "F F P" in the three ( ) located in item # 16 on the I-765

Money order or bank check for $35.00 made out to INS, if employment authorization is required

Affidavit of family membership, using the required format

THE RPF WILL USE THE LAPS SYSTEM TO DO THE FOLLOWING:

Note: Simply stated, the RPF will handle the I-765 with accompanying documentation, in very much the same manner as the current I-698, used by temporary residents under § 245a to apply for adjustment to permanent resident status.

1. If application is complete, as required, process. If not, it is returned to the alien until it is perfected.

2. If processable, the I-765 is forwarded to data entry. Here, a new A-number will be assigned to the application and the resulting record.

3. LAPS will be used to capture all data from the I-765 for which there is a comparable field in LAPS. For starters, the form type will be I-765, the fee amount $35.00, etc. Information for which there is no comparable field in LAPS will not be able to be keyed until modifications are made to the system. The resulting electronic record will enable the Service to track individual cases, produce timely management reports, and send notices to the alien.

4. After data entry, all paperwork is placed in the appropriate A-file folder.

5. The fee, if indicated, is processed with monies deposited to X accounts.

6. LAPS will preempt all other interviews which have been scheduled and will schedule I-765 applicants to appear for interview instead, at the earliest practicable date.

7. LAPS prints an automated mailer to the applicant. This mailer tells the alien that their request for coverage under FFP has be received. The mailer states that it is a replacement I-689 document and grants employment authorization until the date of a scheduled interview. Suggested text:

   "We have received your request for relief from deportation under the Family Fairness Policy. You must appear at the office listed below on _____ for an interview so we may make a decision on this application. If we approve your application, you will receive employment authorization at that time. If you move, notify the INS of your new address using form I-697A, available at any INS office."

   MESSAGE REPEATS IN SPANISH – MAXIMUM MAILER LINES = 12

7A. Alternatively, if policy requires that employment authorization be instantaneous, upon processing of the I-765, the suggested language is:

"We have received your request for relief from deportation under the Family Fairness Policy. You will be notified to appear at an INS office for an interview so we may make a decision on this application. This document replaces form I-689 and, combined with proper identification, authorizes employment until _____. If you move, notify the INS of your new address using form I-697A, available at any INS office."

MESSAGE REPEATS IN SPANISH – MAXIMUM MAILER LINES = 12

ALIEN RECEIVES NOTICE AND SHOW UP AT PHASE II OFFICE HAVING LAPS ACCESS

1. I-213 completed on alien. Decision on EVD is made.
2. Alien is interviewed to determine applicability of FFP relief and veracity of family relationship claim. Examiner uses online screen record of I-765 data.
3. If I-765 approved, alien processed at that office for EAD card.
4. If FFP coverage denied, alien notified in writing using Form I-210. LAPS screen updated to reflect status.
5. Copy of I-210, I-213 sent to district Deportation and Investigation branches for issuance of an OSC if alien does not leave the country within 30 days voluntarily, as provided on the I-210.

ESTIMATED RESOURCES REQUIRED	@1,000,000 interviewed in 100 workdays		
1. Clerical staff at RPFs:	100	est cost.	$ 1,348,500
2. Adjudicators at RPFs:	250		3,371,250
3. Clerical staff in Field:	250		3,371,250
4. Adjudicators in Field:	500		6,742,500
est. subtotal personnel costs:	1,100		$ 14,833,500
est. software modification costs:			200,000
est. miscellaneous support costs:			2,000,000
total estimated costs:			$ 17,033,500

PRO:

- Centralizes control, security and consistency.
- Requires less personnel than a more distributed plan.
- Buys the Service valuable time to get ready. The time normally wasted in mailing can work to our benefit.
- Diminishes the potential for a "circus atmosphere" created by the media or our critics, who will be avidly looking for signs of disorganizations or inconsistency at our offices.

CON:

- Cost. This can be offset if the Legalization program is allowed to use the fees received from Form I-765 applications, without restriction, to accomplish this special project and to remedy disruption caused to the ongoing legalization, SAW and RAW programs.
- Holds the alien, and their representative at arms length. This may be perceived as negative by the

public. However, given the emotional nature of this issue, the Service cannot take the risk of exposing too much of itself to the public until we are ready to handle however many aliens come forward.

T. Andreotta (Feb. 8, 1990)

RPF-1.FFP

[SEAL OMITTED]

Feb. 2, 2015

Via CM/ECF

The Honorable Andrew S. Hanen
600 East Harrison Street, #101
Brownsville, Texas 78520

Re: *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.)

Dear Judge Hanen:

At the January 15 hearing on our motion for a preliminary injunction, the Court contemplated that the Plaintiff States would respond by letter to Defendants' anticipated sur-reply. More than two weeks after that hearing—to which Defendants did not object—Defendants offered new declarations from previously undisclosed witnesses. This letter explains why nothing in Defendants' sur-reply or their untimely new exhibits undermines Plaintiffs' entitlement to relief.

I. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION WITHOUT A NEW HEARING

Defendants' sur-reply raises five new issues. Plaintiffs briefly respond to each issue below. None warrants denial of the preliminary injunction, or necessitates a new hearing before granting it.

A. First, Defendants have yet again changed their position on driver's licenses. Having previously told the Ninth Circuit one thing and this Court another, Defendants now offer a third position: States are free to deny "driver's licenses to DACA and DAPA recipients, so long

as the States base [the denials] on existing federal alien classifications." Sur-reply 7. But that is *exactly* what Arizona did before being enjoined at Defendants' urging. Arizona refused to give licenses to anyone with deferred action. And it did so based on all three of the preexisting "federal alien classifications" for deferred action: "deferred enforced departure" (DED), "deferred action" (DA), and "Deferred Action for Childhood Arrivals" (DACA). *See* ADOT Policy 16.1.4, Establishing Authorized Presence 4 (attached as Ex. A). Those are not Arizona's classifications. *Defendants* created them and even assigned codes to them: the federal classification codes for DED, DA, and DACA are "(a)(11)," "(c)(14)," and "(c)(33)," respectively. *See* USCIS Instructions for I-765, Application for Employment Authorization 1, 5 (attached as Ex. B). *Defendants* use those alien-classification codes for issuing work permits. *See* USCIS Form I-765, Application for Employment Authorization at Box 16 (attached as Ex. C). But when Arizona tried to deny driver's licenses to all deferred-action recipients, using Defendants' own alien-classification codes to identify those recipients, Defendants convinced the federal courts to enjoin the effort. *See* Order and Permanent Injunction 5, *Ariz. Dream Act Coalition v. Brewer*, No. 12-cv-2546 (D. Ariz. Jan. 22, 2015) (attached as Ex. D) (enjoining Arizona from denying driver's licenses based on Defendants' own (a)(11), (c)(14), and (c)(33) codes). Four of the Plaintiff States are effectively bound by a federal injunction that Defendants helped secure. Defendants cannot turn around and contend that the States' free "choices"—rather than the preemptive force of federal law—are to blame for the burdens of issuing new driver's licenses.

Moreover, even if the States could change their licensing laws, Defendants still cannot characterize Plaintiffs' injuries as "self-inflicted." To the contrary, Article III allows States to challenge federal efforts to interfere with preexisting state programs. *See, e.g.*, *Alaska v. DOT*, 868 F.2d 441, 443 (D.C. Cir. 1989) ("emphatically" rejecting DOT's argument that 27 state Attorneys General, including Texas's, lacked standing to challenge federal agency action that affected a state program); *cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (a State cannot create its own standing by passing a new statute that intentionally conflicts with federal law, but States do have standing when federal law affects *preexisting* state programs). As we have explained from the outset, state licensing programs that existed long before DACA and DAPA require Plaintiff States to issue licenses to deferred-action beneficiaries. *See* PI Mot. 27 (ECF No. 5); Second Decl. of Joe Peters (attached as Ex. E). And the States have an Article III interest—vindicable through a suit in federal court—in defending those preexisting "legal code[s]" against changes foisted upon them by federal law. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

B. Second, Defendants have doubled down on their claim that they have unreviewable discretion to give work permits to every single one of the 11 million undocumented immigrants in the United States. *See* Sur-reply 37 (arguing INA does nothing to "preclude[ ] the Secretary . . . from granting work authorization"). But if Defendants were correct that the INA's definition of "unauthorized alien," 8 U.S.C. § 1324a(h)(3), authorizes DHS to

give permits to anyone and everyone, then numerous other statutory provisions would be surplusage. For example, Congress would have no reason to give DHS discretion to "grant work authorization to any alien who has a pending, bona fide [U-visa] application," 8 U.S.C. § 1184(p)(6), if that discretion was hidden in the statute's definitional provision all along. *See also id.* § 1105a(a) (DHS "may authorize" employment of battered spouses of certain nonimmigrants); *id.* § 1154(a)(1)(D)(i)(II), (IV), 1154(a)(1)(K) (VAWA self-petitioners and children are "eligible for work authorization"); *id.* § 1158(d)(2) (applicant for asylum "may be provided [work authorization] under regulation"); *id.* § 1226(a)(3) (DHS may authorize certain LPRs to work); *id.* § 1231(a)(7) (DHS may authorize certain unremovable individuals to work). Defendants' only response is that Congress's decision to authorize work permits in *some limited* circumstances purportedly means that Congress authorized work permits in *any and every* circumstance. Sur-reply 36-37. Precedent forecloses this irregular approach to statutory interpretation and administrative delegation. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Nor can Defendants avoid the problem by noting that the States do not "separately" challenge a regulation purporting to authorize a work permit for "[a]n alien who has been granted deferred action." 8 C.F.R. § 274a.12(c)(14); *see* Sur-reply 35-36. That regulation is lawful insofar as Congress authorized the work permits, as it did for VAWA self-petitioners. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV). Thus, the regulation is not unlawful in all of its applications—*i.e.*, "separately" from

Defendants' use of it here. What *is* facially unlawful is Defendants' reading of a regulation supported only by limited grants of authority as nevertheless authorizing work permits for every single undocumented immigrant in the country. Defendants still refuse to offer any limiting principle for their alleged unreviewable discretion to issue work permits to anyone they please.

C. Third, Defendants gain nothing by belatedly attempting—for the first time since the creation of DACA and DAPA—to identify examples of "case-by-case discretion" under the programs. Out of 727,164 DACA applications, Defendants issued a "Notice of Intent to Deny" in only 6,496 cases (less than 1%). *See* Sur-reply App. 511-12. Even more remarkably, Defendants can point to only two NOIDs that were allegedly based on "discretionary" considerations (less than 0.00028%). *See id.* at 554-55. Moreover, in both of those allegedly "discretionary" cases, the DACA applicant *did* violate DHS's eligibility criteria by "committ[ing] Robbery and Grand Theft," *id.* at 554, or by "committ[ing] multiple felonies" including "the sale of illegal drugs," *id.* at 555. *See* Memorandum for Thomas S. Winkowski *et al.* from Jeh Johnson, Policies for Apprehension, Detention and Removal of Undocumented Immigrants 3 (Nov. 20, 2014) ("Johnson-Winkowski Memo") ("felony" makes applicant ineligible for DACA). Even if a 0.00028% denial rate qualifies as genuine "discretion," it is unreasonable to call these two NOIDs "discretionary" simply because the ap-

plicants committed their felonies when they were juveniles. Sur-reply 32; Sur-reply App. 512.[†]

More fundamentally, Defendants cannot leverage their supposed "case-by-case discretion" to preclude judicial review of their actions. Agency *inaction* generally is immune from judicial review because courts are ill-equipped to evaluate the "complicated balancing of a number of factors" that inform an agency's discretionary decision not to act in a particular case. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining unreviewable inaction must be truly discretionary). But as *Chaney* itself acknowledged, the exact opposite is true when agencies take action: "[W]hen an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." *Id.* at 832 (emphasis in original). That is why judicial review routinely attaches to agency action, even when the agency has broad discretion in deciding how to act. *E.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002) ("This case exemplifies the principle that the Board's discretion . . . , though gen-

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[†] It is even more unreasonable to claim that "gang membership" and "fraud" in the DACA-application process qualify as "discretionary" reasons. Sur-reply App. 510, 512. "Gang activity" is expressly prohibited by DHS's eligibility criteria. *See* Johnson-Winkowski Memo 3. Moreover, the DACA application itself states that fraud is a "felony" and hence a violation of DHS's no-felony eligibility criterion. *See* USCIS Form I-821D, Consideration of Deferred Action for Childhood Arrivals 5 (attached as Ex. F) (requiring applicant to certify: "I also understand that knowingly and willfully providing materially false information on this form is a federal felony").

erally broad is not unlimited." (citation omitted)). And that is one reason why judicial review attaches here: No matter how broad DHS's discretion not to enforce the INA, it must have constitutional and statutory authority when it *does* act—for example, by setting up a program to grant millions of deferred-action applications and work permits. Thus, "discretion" and *Chaney* do not shield the DHS Directive from judicial review.

To be sure, "case-by-case discretion" determines whether the Directive is a "substantive rule" under the APA. If the contractors and employees in DHS service centers had genuine discretion, and were in no way bound by the Directive, then the Directive would be a non-binding "policy statement," exempt from the APA's notice-and-comment requirements. But Defendants do not dispute that it is *their* burden to prove that the DHS Directive is merely a "policy statement." *See* PI Reply 34-35 (ECF No. 64) (explaining that APA creates presumption of reviewability, which agency bears burden to rebut). And in order to prove that the DHS Directive is a policy statement, DHS must justify every deferred-action decision without regard to the Directive's eligibility criteria: "When the agency applies the policy in a particular situation, it must be prepared to support the [decision] just as if the policy statement had never been issued." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995) (internal quotation marks omitted). This they cannot do. Even using Defendants' most-aggressive numbers in this case, far more than 90% of DHS's decisions were based *exclusively* on the Directive's eligibility criteria. And Defendants can point to no case, from any court, suggesting that a similar pattern

of decisionmaking can avoid compliance with the APA as a mere "policy statement."

D. Fourth, Defendants cannot avoid judicial review by claiming that the Plaintiff States fall outside the APA's "zone of interests." Sur-reply 16-17. Plaintiffs' procedural claim falls squarely within the zone of interests under the APA's notice-and-comment provision, which "is designed to ensure that affected parties [like the Plaintiff States] have an opportunity to participate in and influence agency decision making at an early stage." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). And the Plaintiff States' substantive challenge also falls within the zone of interests of federal immigration laws, the "clear intent" of which is "to protect American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working conditions." *Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. Cir. 2014); *accord Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990). It is well settled that States have *parens patriae* standing to vindicate that interest. *E.g.*, *Alfred L. Snapp*, 458 U.S. at 608-10.

If there were any doubt, the Plaintiff States benefit from a heavy thumb on the scale. The Supreme Court has said that the zone-of-interests test is "not especially demanding" and has instructed federal courts to "apply the zone-of-interests test in a manner consistent with Congress's evident intent . . . to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014)

("[T]he benefit of any doubt goes to the plaintiff."); *ibid.* (insisting upon a "lenient approach" when applying the "generous review provisions of the APA"). Indeed, the zone-of-interests test "forecloses suit only when plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress authorized the plaintiff to sue." *Lexmark*, 134 S. Ct. at 1389 (internal quotation marks omitted). Defendants cannot use the zone-of-interests doctrine to tell more than half of the States in the Union *both* that the INA preempts States' police powers with regard to immigration *and* that States are barred from complaining in any forum that the federal government is not following the INA. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (noting "in the federal system, the States are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty" (internal quotation marks omitted)).

E. Finally, Defendants have reiterated their abiding disagreement with *Massachusetts v. EPA*. *Compare* Sur-reply 13 (arguing that States cannot bring "*parens patriae* suits against the Federal Government"), *with Massachusetts*, 549 U.S. at 519-20 & n.17 (holding Massachusetts has "standing to sue *parens patriae*," even "against the Federal Government" (internal quotation marks omitted)). Defendants cannot avoid the legal import of that decision by pretending that it only applies "to property that the State itself owned." Sur-reply 13. That is like saying that *Youngstown* only applies where the President seizes steel mills. And in all events, the Plaintiff States' injuries in this case *do* affect property

that the States themselves own—including schools, healthcare systems, law-enforcement assets, and land along their borders.

Nor can Defendants distinguish *Massachusetts* by claiming that the States' injuries here are somehow more speculative. Their effort is based on the declaration of Michael Hoefer, a USCIS employee with a bachelor's degree in industrial and labor relations and no graduate or post-graduate education or training in any field. *See* Sur-reply App. 445. Even assuming Mr. Hoefer could in theory challenge Dr. Karl Eschbach's expertise in demography—which is based on a doctoral degree and more than two decades of relevant graduate and post-graduate training and experience—he has not done so here. Mr. Hoefer does not dispute that approximately 400,000 undocumented immigrants leave the United States each year voluntarily or through removal by DHS. *See* Eschbach Decl. ¶ 12 (Plaintiffs' PI App. 757 tbl. 2). But *everyone* who receives deferred action and a work permit will have zero prospect of removal by DHS and will have drastically reduced (if not eliminated) incentives to leave voluntarily. Thus, even if the Directive had no effect on new illegal immigration, its effects on those already here would be enough to give the Plaintiff States standing to challenge costs to their public programs, like schools and healthcare systems. Moreover, even assuming that Mr. Hoefer is competent to testify about the cause-and-effect relationship between federal legalization programs and new illegal immigration, he does not (and could not) suggest that this relationship is somehow more tenuous than the one between EPA's regulation of new-car carbon emissions and the erosion of Massachusetts's shoreline.

II. ALTERNATIVELY, THE COURT SHOULD HOLD A SECOND HEARING

The new declarations accompanying Defendants' sur-reply do not create any *material* factual dispute, for all of the reasons explained here and previously. Indeed, given that Defendants had over a week to review each and every one of Plaintiffs' factual assertions before the hearing, and given that Defendants participated in the hearing without objection, they cannot later manufacture a fact dispute by offering new, post-hearing declarations. That is sandbagging. *See Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353 (5th Cir. 1971) (reversing where litigant produced 175 of pages of evidence on the day of the preliminary-injunction hearing, thus denying its opponent a chance to review the evidence and seek resolution of any factual disputes at the hearing).

But if the Court decides that the Defendants' new declarations create a fact dispute of material consequence to the motion (which they do not), the correct step would be to hold a second hearing. As Wright and Miller observe, "most courts[, including the Fifth Circuit,] hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided to any party who requests one." 11A Fed. Prac. & Proc. Civ. § 2949 & n.43 (3d ed. 2014 Supp.) (citing, *inter alia*, *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958)). Although Defendants unsurprisingly disclaim that right, Sur-reply 9 n.5, we made clear at the January 15 hearing that Plaintiffs want to preserve it; Defendants cannot override Plaintiffs' objection by filing un-crossed decla-

rations 15 days later. *See Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 927 n.17 (W.D. Tex. 2012) (defendant's denial of that opportunity requires discounting weight of defendant's post-hearing submissions). Moreover, to the extent it matters that defendant Vitiello authored a memorandum asserting a cause-and-effect relationship between illegal immigration and Defendants' violations of the INA, *but see* Sur-reply 9 n.6 (denying that relationship), Plaintiffs should be allowed to call him to testify and establish it.

* * *

On the day Defendants filed their sur-reply, USCIS publicly announced that the 2014 DHS Directive will go into effect on February 18, 2015. *See* http://1.usa.gov/1wPXWrb. For the sake of those who will rely on Defendants' invitation to "come out of the shadows," FAC ¶ 50, and to preserve the legal rights of more than one-half of the States in the country, Plaintiffs respectfully request injunctive relief by that date.

Sincerely,

/s/ ANDREW S. OLDHAM
ANDREW S. OLDHAM
Deputy Solicitor General of Texas
Counsel for Plaintiffs

cc: All counsel of record via CM/ECF

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF SARAH R. SALDAÑA

I, Sarah R. Saldaña, hereby make the following declaration with respect to the above-captioned matter.

1. I am the Director of U.S. Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS or Department). I have held this position since December 23, 2014. My current work address is: 500 121th Street Southwest, Washington, D.C. I am a graduate of Texas A&I University, currently Texas A&M University, and hold a Bachelor of Science degree. I also hold a Juris Doctorate from Southern Methodist University.

2. Before becoming ICE Director, I served as United States Attorney for the Northern District of Texas for more than three years. I was previously an Assistant United States Attorney in the Northern

District of Texas and a partner in the trial department of a law firm in Dallas, Texas.

3. In my current position as ICE Director, I lead the largest investigative agency within DHS, overseeing nearly 20,000 employees in 400 offices across the country.

4. I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties.

The DHS and ICE Immigration Enforcement Mission

5. ICE is one of the three DHS components with responsibilities over the administration and enforcement of the nation's immigration laws. The other two agencies are: U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. In working to achieve its mission, ICE coordinates closely with CBP, which includes the Offices of Border Patrol, Field Operations, and Air and Marine Operations, and employs the uniformed corps of officers and agents charged with patrolling our nation's ports and borders. ICE also partners with USCIS immigration adjudicators who decide eligibility for immigration benefits and certain other forms of immigration relief.

6. Within ICE, the Office of Enforcement and Removal Operations (ERO) is responsible for identifying,

apprehending, detaining, and removing inadmissible or deportable aliens from the United States, as appropriate. ERO also removes aliens transferred to ICE by CBP officers and agents, and aliens against whom removal proceedings are initiated by USCIS. Based on limited resources, DHS does not have the capacity to investigate, detain, and remove all individuals who violate our immigration laws. For the last several years, ERO has consistently removed between 300,000 and 400,000 aliens annually from the United States. In light of DHS's limited resources and statutory mandates, ICE prioritizes the apprehension and removal of persons who pose a threat to national security, persons apprehended while attempting to illegally cross the border or who recently did so ("recent border crossers"), and persons convicted of serious crimes or who otherwise threaten public safety. The vast majority of individuals removed by ICE fall into one of these categories.

ICE Enforcement Challenges

7. Besides limited resources, ICE faces several challenges in accomplishing its enforcement mission. One challenge requiring ICE to spend more resources conducting removals is the changing demographics of the immigrant population entering the country. Since FY 2010, the number of Mexican nationals apprehended by the Border Patrol has fallen by 43 percent, while the number of apprehensions of nationals from El Salvador, Guatemala, and Honduras has increased by 423 percent, in FY 2014. In general, removing Central Americans is more resource-intensive than

removing Mexican nationals. While a Mexican national apprehended by CBP may, in many cases, be removed in a matter of hours, often without entering ICE custody, a national of a non-contiguous country apprehended at the border must generally be transferred to ICE and may need to remain in ICE custody for weeks or months until travel documents can be obtained from that country and removal arrangements via aircraft can be arranged.[1]

8. Another important demographic change impacting Department operations was the unprecedented surge of children and families from El Salvador, Guatemala, and Honduras intercepted at the border during FY 2014. Such cases present unique challenges for ICE given the special care needed and the legal obligations imposed by applicable laws and court orders with regard to providing housing for alien children in immigration proceedings,[2] as well as the

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[1] Although inadmissible aliens apprehended at the border are often subject to the "expedited removal" process, those who demonstrate a "credible fear" of persecution or torture if returned to their countries are legally entitled to formal removal proceedings before an immigration judge, which can take many months, if not years, to complete. Because nationals of some Central American countries are more likely than Mexican nationals to claim a fear of return, the increased percentage of Central American apprehensions increases DHS's costs in managing and deterring border violations.

[2] *See* William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (Dec. 23, 2008); *Flores* settlement agreement, *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal. Jan. 17, 1997).

stringent standards applicable to ICE family residential centers.[3] In order to respond to these developments, ICE has significantly expanded its family-appropriate housing, which must be designed and operated in a manner appropriate for the unique needs of this population and compliant with applicable legal requirements and residential standards, which are far more expensive to satisfy than those applicable to adult detention facilities.

9. As mentioned above, ICE's mission includes both the removal of aliens from the interior of the country and the removal of aliens apprehended by CBP while attempting to illegally enter the United States. To address the demographic changes in illegal immigration (i.e., increases in Central Americans and families requiring ICE involvement), and to do our part to ensure border integrity, ICE has detailed resources from the interior of the country to the border. This, in turn, results in fewer resources available to identify, detain, and remove individuals in the interior of the country. For instance, over the course of FY 2014, ERO detailed over 800 of its officers and support personnel (over 10 percent of the ERO workforce) to support southwest border operations. ICE also reallocated increased detention capacity, transportation resources, and other assets to support those operations.

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[3] *See* ICE Family Residential Standards, at http://www.ice.gov/detention-standards/family-residential.

10. Additionally, the fact that many state and local jurisdictions have restricted or prohibited their law enforcement officers from cooperating with immigration detainers, which are used by ICE to facilitate the transfer of a removable alien from criminal custody, has also required ICE to expend additional resources in attempting to gain custody of these individuals before they are released or shortly thereafter.

11. Another factor significantly impacting the ability of ICE to remove individuals from the United States is the backlog of the nation's immigration courts, which are under the jurisdiction of the Department of Justice. At the end of FY 2014, there were 418,861 cases pending before the immigration courts, up from 262,622 at the end of FY 2010. In particular, cases on the non-detained immigration court dockets now routinely take years or more to complete.

Establishment of Department-Wide, Coordinated Enforcement Efforts

12. Given DHS finite resources, Secretary Johnson issued Department-wide immigration enforcement priorities on November 20, 2014. Under the Secretary's November 20, 2014 guidance, all DHS immigration components operate under the same three enforcement priorities: Priority 1, for aliens who pose a threat to national security, are apprehended at the border, are members of organized criminal gangs, or have been convicted of felony offenses; Priority 2, for aliens who have been convicted of certain misdemeanors, have recently entered the country, or have signif-

icantly abused the visa or visa waiver programs; and Priority 3, for certain aliens with final orders of removal. To further ensure that DHS's limited resources are available to pursue such aliens, the memorandum directs that resources "be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified." This memorandum ensures that the three DHS immigration components have the same removal priorities, which enhances coordination and efficiency.

13. In conjunction with this prioritization memo, the Secretary also issued on November 20, 2014, the memorandum that has now been enjoined that provides guidelines for the use of a form of prosecutorial discretion known as "deferred action," on a case-by-case basis, for certain aliens. The memorandum generally provides guidelines for two types of undocumented aliens who have been living in the United States since before January 1, 2010, who have significant ties to the country, who submit fingerprints and pass background checks, and who otherwise pose no danger to the country. First, the memorandum expands the 2012 "Deferred Action for Childhood Arrivals" (DACA) policy, which established guidelines concerning the availability of deferred action for such individuals who were brought to the country as children (i.e., before the age of 16). Second, the memorandum establishes "Deferred Action for Parents of Americans or Lawful Permanent Residents" (DAPA), which provides guidelines on the availability of de-

ferred action for those who are parents of U.S. citizens or lawful permanent residents.

Effects of the Injunction

14. The expansion of DACA and the implementation of DAPA represent an effort by DHS to better prioritize its limited resources against individuals who pose threats to national security, public safety, or the integrity of the border. Among other things, the policies are intended to: incentivize certain non-priority aliens to present themselves to DHS, submit biographic and biometric information, and undergo background checks; and provide temporary relief from removal, which is expected to assist state and local law enforcement agencies with community-policing efforts, as explained in the amicus brief submitted in this case by numerous sheriffs and police chiefs. These policies are intended to complement and support DHS's effective, priority-based use of its resources.

15. Enjoining the policies would prevent ICE from benefitting from the efficiencies that such policies are intended to create. For instance, when state and local law enforcement agencies encounter an alien who has received deferred action under these policies, ICE personnel would be able to quickly confirm the alien's identity through a biometric match. This is because USCIS collects fingerprints and conducts background checks for DACA and DAPA requestors. The availability of such information allows ICE to more efficiently work with our law enforcement partners to promote public safety.

16. Similarly, when ICE officers are engaged in at-large enforcement operations, such as to locate criminal and fugitive alien targets, they often encounter non-target aliens who may also be removable from the United States. If such aliens have received deferred action under these guidelines and have documentary proof of this on their persons, ICE officers would be able to ascertain more quickly whether enforcement resources should be expended to detain and initiate removal proceedings against the individuals. This would also allow ICE to further focus its resources on priority aliens.

17. The DACA and DAPA policies are also intended to assist with the efficient processing of high-priority cases in the immigration courts. While ICE attorneys who represent DHS in removal proceedings before the immigration courts can and do exercise prosecutorial discretion to promote efficient handling of dockets by immigration judges, DAPA and expanded DACA, once implemented, can potentially further assist ICE attorneys and immigration judges in identifying non-priority cases. And, when an alien in removal proceedings receives deferred action from USC IS under DAPA or expanded DACA, the immigration judge may administratively close the case, thereby making additional docket time available for high-priority cases. Once the cases of aliens with deferred action under DAPA and expanded DACA are taken off the immigration dockets, immigration judges should be able to focus more time and effort on the

adjudication of cases involving recent border entrants and national security and public safety threats.

18. Enjoining the DAPA and expanded DACA policies is also likely to limit, in certain circumstances, the ability of law enforcement officials to protect public safety. As I recently wrote in an opinion editorial for the Dallas Morning News, "cooperation between police and community members is a cornerstone of modern law enforcement."[4] While ICE has long taken steps to ensure that prosecutorial discretion is appropriately used when the agency encounters individuals who are crime victims and witnesses,[5] I believe that DAPA and expanded DACA will further enhance the willingness of undocumented crime victims and witnesses to come forward and cooperate with their local law enforcement agencies, thereby bolstering efforts by police to address crimes that affect our communities, including domestic violence, human trafficking, and gang activity.

19. In sum, preventing the deferred action policies from going into effect interferes with the Federal Government's comprehensive strategy for enforcing our

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[4] Sarah Saldaña and Gil Kerlikowske, *Obama's immigration initiative will make nation safer*, The Dallas Morning News, Jan. 20, 2015, http://www.dallasnews.com/opinion/latest-columns/20150120-sarahsaldana-and-gil-kerlikowske-obamas-immigration-initiative-will-make-nation-safer.ece.

[5] *See, e.g.*, ICE Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

immigration laws. The halting of DAPA and expanded DACA jeopardizes the efficiencies that such policies can provide to ICE, making it more difficult to efficiently and effectively carry out its mission. The injunction also undermines the effectiveness of community policing in various jurisdictions, impedes the identification of non-priority aliens, and leaves in place a barrier to more efficient proceedings to remove threats from our country.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of Feb., 2015.

/s/ SARAH R. SALDAÑA
SARAH R. SALDAÑA
Director
U.S. Immigration and
Customs Enforcement

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Case No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF R. GIL KERLIKOWSKE

I, R. Gil Kerlikowske, hereby make the following declaration with respect to the above-captioned matter.
1. I am the Commissioner of U.S. Customs and Border Protection (CBP). I have held this position since March 7, 2014. My current work address is 1300 Pennsylvania Ave., N.W., Washington, D.C. I hold a B.A. and an M.A. in criminal justice from the University of South Florida.

2. Prior to my tenure as CBP Commissioner, I had approximately four decades of experience with law enforcement and drug policy. From 2000 to 2009, I served as the Chief of Police for Seattle, Washington. From 2009 to 2014, I served as the Director of the Office of National Drug Control Policy, and from 1998 to 2000, I served as Deputy Director for the U.S. Department of Justice, Office of Community Oriented Policing Services. In addition, I served as the Police

Commissioner for Buffalo, New York, from 1994 to 1998. I began my law enforcement career as a police officer in St. Petersburg, Florida, in 1972.

3. In my position as CBP Commissioner, I oversee approximately 60,000 employees. CBP officers protect our nation's borders and safeguard national security by keeping criminal organizations, terrorists, and their weapons out of the United States while facilitating lawful international travel and trade.

4. I make this declaration on the basis of my personal knowledge as well as information made available to me in the course of my official duties.

The DHS and CBP Immigration Enforcement Mission

5. DHS has three components with responsibilities over the administration and enforcement of the nation's immigration laws: CBP, U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). CBP secures the borders at and between ports of entry, preventing the admission of inadmissible aliens and the entry of illicit goods. CBP works closely with ICE, which is responsible for identifying, apprehending, detaining and removing inadmissible and deportable aliens from the United States, including many such aliens apprehended by officers and agents of CBP. CBP also works closely with USCIS, which, among other duties, determines on a case-by-case basis whether deferred action is appropriate under certain circumstances.

6. CBP Officers and Agents regularly encounter individuals who lack lawful status to enter or remain in the United States. For instance, in fiscal year (FY) 2014, Border Patrol apprehended 486,651 individuals who lacked lawful presence in the United States. While the vast majority of these individuals were apprehended while attempting to illegally cross the border, or after recently crossing the border into the United States, the Border Patrol also encounters individuals who are unlawfully in the country, often at checkpoints located at places of strategic importance, furthering the broader work of border security throughout the area.

Benefits of Deferred Action for CBP Immigration Enforcement Efforts

7. When a Border Patrol Agent at a checkpoint or other location encounters an individual whose lawful status is not apparent after initial questioning, that alien is taken to the nearest location where the Agent can more fully question and process the alien. During processing, an alien's biographic information and biometrics (i.e., fingerprints) are collected. Records checks are run through CBP and other law enforcement systems. Agents review all of the pertinent facts and circumstances to determine whether or not the alien is a priority for removal, consistent with Secretary Johnson's memorandum of November 20, 2014, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, including whether the alien poses a threat to national security, border security (including those who recently unlaw-

fully entered the United States), or public safety. Processing individuals (which involves questioning the individuals, collecting biographic and biometric information, and conducting background checks) takes Border Patrol Agent time that could otherwise be spent at the checkpoint or on other enforcement duties.

8. Individuals who were granted deferred action under the 2012 Deferred Action for Childhood Arrivals (DACA) guidelines are, at times, encountered by Border Patrol Agents at checkpoints or other locations. When a DACA recipient is encountered at a checkpoint or other location and is able to provide DACA documentation or a work authorization document, a Border Patrol Agent can more efficiently verify the identity of the individual, as well as the authenticity of the documentation provided. Absent other facts and circumstances meriting further inquiry, upon verifying the information provided, Border Patrol Agents normally take no further action with respect to that individual. Instead, Border Patrol Agents rely on the determination made by another component of DHS, USCIS, that the encountered individual is not a priority for an immigration enforcement action. Thus, DACA facilitates CBP more efficiently identifying those individuals who are not a priority for removal and better concentrate its limited enforcement efforts on those who pose a threat to national security, border security, and public safety.

9. I expect that the Deferred Action for Parents of Americans or Lawful Permanent Residents (DAPA)

guidelines, as well as the guidelines that expanded DACA, announced by Secretary Johnson in November 2014, would create the same resource efficiencies that DACA, as announced in 2012, created, as they involve conducting background checks and providing similar documentation to certain aliens who have strong ties to the United States and are not enforcement priorities. Because policies like DACA and DAPA encourage certain aliens to come forward and identify themselves to USCIS, these policies create an efficient mechanism for CBP to quickly identify aliens who are not priorities for removal and thus focus limited resources on high priority aliens. DACA and DAPA thus support CBP's overall mission to secure the border.

10. I am aware that this Court has temporarily enjoined implementation of DAPA and the 2014 modifications to DACA. By preventing certain aliens who are not a priority for deportation from obtaining DAPA documents (or DACA documents under the expanded guidelines), the temporary injunction interferes with the agency's ability to obtain the enforcement efficiencies that DAPA and the expansion of DACA are anticipated to create, for the time that the injunction remains in place. The injunction is thus expected to impair CBP's ability to ensure that its limited enforcement resources are spent in the most effective and efficient way to safeguard national security, border security and public safety.

Effects of Injunction

11. Based on my years of experience in law enforcement, I believe that DACA and DAPA substantially benefit the overall safety of our communities, and that the temporary injunction the Court has entered detracts from those benefits.

12. As a former police chief and now the Commissioner of one of the world's largest law enforcement organizations, I understand the critical need to prioritize law enforcement resources. If law enforcement organizations do not ensure that their limited resources are directed to their highest priorities, overall public safety might be compromised. Focusing limited immigration enforcement resources on aliens who are eligible for DACA and DAPA is anticipated to divert resources from recent border crossers and real national security and public safety threats, such as those who may be terrorists, smugglers, drug traffickers, or engaged in transnational organized crime.

13. Another anticipated law enforcement benefit of DACA and DAPA is that, by temporarily eliminating the immediate fear of detention and deportation, recipients might be more inclined to cooperate with federal, state, and local law enforcement in reporting crimes or serving as witnesses in criminal cases. As the numerous law enforcement officials have made clear in an amicus brief filed in this case, DAPA and DACA are expected to support community policing efforts and help law enforcement agencies safeguard their communities.

14. DAPA and the expansion of DACA would allow a significant number of otherwise law abiding aliens with strong ties to the country to step forward and request deferred action. By halting implementation of DAPA and the expansion of DACA, the temporary injunction undermines these potential law enforcement benefits for the duration of time that the injunction remains in place.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of Feb. of 2015.

/s/ R. GIL KERLIKOWSKE
R. Gil Kerlikowske
Commissioner

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-00254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Mar. 3, 2015

DEFENDANT'S ADVISORY

Defendants file this Advisory to inform the Court of certain actions that U.S. Citizenship and Immigration Services ("USCIS") took pursuant to the November 20, 2014 deferred action memorandum at issue in this case before the Court issued its preliminary injunction on February 16, 2015. Defendants do not believe that the preliminary injunction requires them to take any affirmative steps concerning those pre-injunction actions, but Defendants nevertheless wish to ensure that the Court is fully aware of those actions.

On February 16, 2015, the Court granted Plaintiffs' Motion for Preliminary Injunction and enjoined Defendants from implementing "any and all aspects or phases" of Deferred Action for Parents of Americans

and Lawful Permanent Residents ("DAPA"). Order of Temporary Inj. ("Order") at 1 [ECF No. 144]. The Court also enjoined "any and all aspects or phases of the expansions (including any and all changes)" to Deferred Action of Childhood Arrivals ("modified DACA"), as set forth in the memorandum issued by the Secretary of Homeland Security on November 20, 2014 ("Deferred Action Guidance"). *Id.* at 2.

The changes to DACA set forth in the Deferred Action Guidance and referenced in the Court's Order included two separate expansions of the substantive eligibility guidelines for DACA: first, removal of the existing age cap of 31; and second, adjustment of the relevant date by which an individual must have been in the United States from June 15, 2007, to January 1, 2010. *See* Deferred Action Guidance at 4 [ECF No. 38-7]. The third change involved adjusting the period of deferred action under DACA from two to three years. *Id.* at 3. By the terms of the Guidance, this last change applied not only to individuals eligible for DACA under the newly expanded guidelines, but also (as of November 24, 2014) to individuals already eligible for DACA under the original 2012 guidelines. *Id.* Plaintiffs do not challenge, and the Court did not enjoin, the original DACA guidelines issued on June 15, 2012. *See* Mem. Op. & Order ("Op.") at 5 [ECF No. 145].

In response to the Court's Order of February 16, 2015, Defendants immediately took steps to cease implementation of DAPA and modified DACA, and believe they have done so. Defendants have not begun

accepting or considering any requests for deferred action under the substantive eligibility guidelines set forth in the Guidance, including the expanded guidelines for modified DACA (*i.e.*, removal of the age cap and the adjustment of the date by which an individual must have been in the United States)—consideration that was otherwise to begin on February 18, 2015. USCIS also immediately ceased providing *three-year* grants of deferred action, as well as three-year Employment Authorization Documents (EADs), to individuals whose requests were approved under the original 2012 DACA guidelines.[1]

Out of an abundance of caution, however, Defendants wish to bring one issue to the Court's attention. Specifically, between November 24, 2014 and the issuance of the Court's Order, USCIS granted three-year periods of deferred action to approximately 100,000 individuals who had requested deferred action under the *original* 2012 DACA guidelines (and were otherwise determined to warrant such relief), including the issuance of three-year EADs for those 2012 DACA recipients who were eligible for renewal. These pre-injunction grants of three-year periods of deferred action to those already eligible for 2012 DACA were consistent with the terms of the November Guidance.

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[1] For any requests for deferred action submitted under the original 2012 DACA guidelines that have been or will be approved following issuance of the preliminary injunction but for which EADs have not yet issued, USCIS will issue periods of deferred action and EADs only for the two-year period set forth in the original 2012 DACA guidelines.

Deferred Action Guidance at 3; *see also* Neufeld Decl. ¶ 12 n.6 ("Pursuant to the November 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewal now receive a three-year period of deferred action.") [ECF No. 130-11]. Defendants nevertheless recognize that their identification of February 18, 2015, as the date by which USCIS planned to accept requests for deferred action under the new and expanded DACA eligibility guidelines, and their identification of March 4, 2015, as the earliest date by which USCIS would make final decisions on such expanded DACA requests, may have led to confusion about when USCIS had begun providing three-year terms of deferred action to individuals already eligible for deferred action under 2012 DACA. *See, e.g.*, Defs.' Mot. for Extension of Time to File Resp. to Pls.' Prelim. Inj. Reply Mem. at 3.

In light of these circumstances, Defendants file this Advisory to ensure that the Court is aware of these pre-injunction actions taken by USCIS. It is Defendants' understanding that the preliminary injunction does not require them to take affirmative steps to alter the status quo as it existed before the Court's Order. *Accord* Op. at 119. For this reason, Defendants do not understand the Order to require Defendants to take affirmative steps to revoke three-year periods of deferred action and work authorization (and accompanying documents, including EADs) that were issued for recipients of deferred action under the original 2012 DACA eligibility guidelines prior to the Court's

February 16, 2015 Order.[4] Defendants nevertheless provide this Advisory to ensure that the Court is fully aware of Defendants' pre-injunction actions, in light of any potential confusion from the intersection of the enjoined Deferred Action Guidance, the 2012 DACA guidelines that remain in place, and Defendants' statements about when grants of DACA under the revised eligibility guidelines would begin taking place.

Dated: March 3, 2015

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

DANIEL DAVID HU
Assistant United States Attorney
Deputy Chief, Civil Division

BENJAMIN C. MIZER
Acting Assistant Attorney General

KATHLEEN R. HARTNETT
Deputy Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

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[4] Notably, the fact that pre-injunction grants of deferred action were issued for increments of three, rather than two, years does not have any present impact on the recipients' ability to remain in the country and work; successive two-year renewals for those eligible for 2012 DACA are authorized by the 2012 DACA guidelines not challenged in this litigation.

/s/ KYLE R. FREENY
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-14-254

STATE OF TEXAS, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

Mar. 19, 2015

MOTION HEARING BEFORE THE HONORABLE ANDREW S. HANEN

APPEARANCES:

FOR THE PLAINTIFFS:

MS. ANGELA V. COLMENERO
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[2]

THE COURT: All right. Be seated.

All right. We're here in B-14-254, Texas versus United States. Who do we have for Texas?

MS. COLMENERO: Your Honor, my name is Angela Colmenero. I'm here on behalf of the plaintiff states, and I'm also joined at counsel table by Cam Barker, Eric Hudson, Adam Bitter and counsel for the State of Indiana, Joe Chapelle.

THE COURT: All right. Thank you, Ms. Colmenero. And for the government?

MS. HARTNETT: Good afternoon, Your Honor. Kathleen Hartnett from the Civil Division, Department of Justice for the federal defendants. And at counsel table with me are Kyle Freeny and Diane Kelleher, also from the Civil Division.

THE COURT: All right. Great.

All right. Ms. Colmenero, we're here on your motion, so if you will lead off.

MS. COLMENERO: Yes, Your Honor.

Your Honor, the plaintiff states filed this lawsuit on December 3rd challenging the DHS directive issued on November 20th that sought to legalize the creation of a deferred action program which would have granted lawful presence to 4 million unauthorized aliens. The plaintiff states moved with great speed after filing their lawsuit by filing a motion for preliminary injunction the day after their lawsuit was filed and requesting relief as quickly as possible due to the emergency [3] created by defendants' actions.

The plaintiffs moved with such speed for one important reason, a desire to preserve the status quo. This is because we knew that once the federal government implemented this new program, it would be virtually impossible to put the toothpaste back in the tube, and the plaintiffs would suffer irreparable injury. Despite the haste with which litigation proceeded and despite assurances from the Department of Justice attorneys that they gave to the plaintiffs and this Court that the status quo would be preserved during the pendency of this litigation, the exact opposite occurred.

Defendants instead granted 100,000 individuals three year periods of deferred action status under expanded DACA, a program plaintiffs explicitly challenged in this lawsuit. Defendants did not inform this Court and plaintiffs did not learn of these developments until March 3rd, nearly 15 days after the preliminary injunction had issued.

These actions have prejudiced plaintiffs as 100,000 individuals received three-year periods of deferred action and three year employment authorization cards.

Defendants have moved for early discovery for two reasons. First, defendants' assurances and representations to this Court do not square with their conduct. The need for discovery that the plaintiffs seek relates not—to us not being sure we can rely on the Department of Justice about what is and what is not [4] currently being done with respect to implementation of programs in the 2014 DHS directive.

Second, defendants have moved for additional discovery—I'm sorry, we've moved for additional discovery because plaintiffs need more information focused on the implementation of expanded DACA in order to determine the scope of the remedies that plaintiffs may pursue in this litigation.

As I indicated earlier, defendants informed this Court through an advisory that between November 24th and the issuance of this Court's preliminary injunction order on February 16th, that USCIS had granted three year periods of deferred action to 100,000 individuals. This was the first time this action had been disclosed to either this Court or the plaintiffs, and plaintiffs were more than surprised by this information.

What is even more troubling than just the disclosure at this stage of the proceeding is that defendants insist that their actions were not inconsistent with the terms of the preliminary injunction or the relief requested by plaintiffs in this lawsuit. Indeed, defendants state that they did not understand plaintiffs to be challenging the issuance of three year deferred action benefits to 2012 DACA renewals.

Defendants' position is just untenable. While defendants are correct that individuals could be eligible to receive renewals of their deferred action periods under the original DACA program, the length of that deferred action would be [5] limited to two years under the original 2012 DHS directive. But that is not the action that defendants took here. Instead, they relied on the November 2014 DHS directive to issue three year periods of deferred action to over 100,000 individuals, a benefit that would not otherwise exist but for the 2014 memo, and a benefit that was directly challenged by the plaintiff states and later enjoined by this Court as unlawful.

The reason plaintiffs are concerned about this information in the advisory is because on three separate occasions, defendants made statements to this Court that directly contradicted the actions they were taking in terms of implementing the expanded DACA program.

First, this Court held an initial status conference over the telephone shortly after the lawsuit was filed. Counsel for plaintiffs expressed concern at that time whether the status quo would be preserved between the date of the conference and the date of the preliminary injunction setting.

In response to questioning from the Court, counsel for defendants stated that the agencies would not begin accepting applications for deferred action until mid February.

Furthermore, counsel for defendants stated that there would not be any decisions on those applications until later and assured the Court that she would not expect

anything to happen between now, the time of the December 19 telephone conference, and the date of the hearing. The plaintiffs relied on this [6] initial assurance of nonaction from the defendants to establish the schedule moving forward on the preliminary injunction.

Second, defendants also filed a motion for extension of time to file a surreply to plaintiffs' reply in support of the preliminary injunction brief. This was filed on January 14th, 2015.

In that brief, defendants represented to this Court that USCIS did not intend to entertain requests for deferred action under the challenged policy until February 18th, 2015; and that once again, no decisions would be made on those applications until at least March 4th, 2015.

Nowhere in this pleading do defendants openly state that they are implementing a portion of the 2014 DHS directive. And again, defendants' assurances of nonaction were relied upon by this Court and plaintiffs as the case progressed.

Finally during the preliminary injunction hearing before this Court on January 15th, the Court questioned defendants regarding—regarding when the status quo would change, and this was in response to the pending motion for extension of time to file a surreply.

Consistent with the prior representations, defendants confirmed that no application for expanded DACA would be accepted until February 18th, and no action would be taken on any of those applications until, once again, March the 4th.

Now, defendants have tried to diffuse the significance of [7] their March 3rd advisory and the information contained therein by claiming that their prior assurances to this Court may have led to confusion. But what defendants do not explain is why they made certain representations to the Court that proved not to be true or, at a minimum, less than forthcoming. They also failed to explain why they chose not to inform the Court that the entire time the lawsuit was proceeding, the entire time they were representing and assuring the plaintiffs that nothing was happening, that the Department of Homeland Security and USCIS was granting tens of thousands of three year periods of deferred action benefits over a two-and-a-half month period.

Defendants have also suggested that expanded DACA applicants for first time beneficiaries are somehow different than renewals for individuals who were already receiving deferred action under original DACA. This is perhaps why they do not understand the plaintiffs to be challenging this program. But that is a distinction without a difference. This is because applicants for renewals submit the same application as first time applicants. They simply check a different box.

As a result, from November 20th until when the preliminary injunction issued, USCIS was receiving renewal applications and they were taking actions on those applications, and plaintiffs believe all of that is contrary to what was conveyed to this Court. Defendants had a duty to the Court and to the plaintiffs to inform them that the entire time this case was moving forward [8] and the preliminary injunction proceeding that they were actively

implementing the expanded DACA program and awarding three year periods of deferred action benefits.

Defendants also attempt to justify their actions by claiming that the plaintiff states and this Court were somehow on notice that three year deferred action benefits were being handed out. We believe this is also incorrect. Defendants point to a declaration from Donald Neufeld which was included in an appendix filed with their surreply on January 30th. But buried in the Neufeld declaration in a footnote in a 566 page appendix is the following statement.

And this statement simply says that pursuant to the November 20th memo issued by Secretary Johnson as of November 24th, 2014, all first time DACA requests and requests for renewals now receive a three year period of deferred action.

While this statement is entirely consistent with the language that was contained within the November 20th DHS directive, nowhere in this declaration is there any statement that defendants were actively issuing three year deferred action benefits to expanded DACA beneficiaries. Instead, just days before this motion was filed with the Court and at the PI hearing, defendants said just the exact opposite. This hardly constitute notice to the plaintiff states that 100,000 deferred action benefits would be doled out and the status quo would be changed during the pendency of the proceeding.

[9]

The plaintiffs states have filed a motion for early discovery in this matter, and we believe it is necessary. The

plaintiff states have been irreparably harmed by defendants' actions in at least the following ways.

First, the plaintiff states have argued that a preliminary injunction was necessary, and this Court, in its February 16th order, agreed because it is virtually impossible to unscramble the egg or put the toothpaste back into the tube once defendants issue lawful presence documents.

Temporary driver's licenses and other state benefits may have been issued to DACA beneficiaries who receive renewals and three year deferred action statuses. At least in Texas, this means that an individual may have received a temporary driver's license for a three year period of time as a result of this renewal of three year deferred action status, and that's because driver's licenses are issued for the length of time in which an individual can lawfully remain in the United States.

To the extent that there's—there's a suggestion that perhaps we could claw back that three year benefit and change that to a two year benefit, that doesn't solve the irreparable harm that the states have suffered. The cost of clawing back driver's licenses only add to the burden of the states and makes it virtually impossible for the states to try to pull that benefit back once it is issued.

Second, plaintiffs also argued in the preliminary injunction [10] proceeding that an injunction was necessary because original DACA program set off a humanitarian crisis, and we sought to prevent another one from occurring. The three year deferred action period that was part of expanded DACA was an added incentive to individuals applying for such a benefit. It goes without say-

ing that a three year term of deferred action and work authorization is more valuable than a two year term. The longer term encourages more applicants for DACA and more DACA renewals. This triggers immediate costs to the states that we have asserted in response or in our preliminary injunction motion such as issuing driver's licenses and other benefits to the people who newly apply for or renew those benefits.

Third, every instance of the executive issuing more favorable benefits such as expanded DACA or even original DACA increases the perception that immigrating illegally now will yield lawful presence down the road, which as we have established in our briefing to this Court on the preliminary injunction, increases costs to the states.

Finally, there is harm that actually happens in the third year under expanded DACA. Although defendants claim that no harm exists because these individuals would have received a two year deferred action renewal under original DACA, this does not mean that everyone would have received this benefit. Individuals still must meet the eligibility requirements, so there is at least some percentage of people who got a third year [11] under expanded DACA who would not have received two year term under original DACA. That third year would lead to a certain percentage to remain in the country during that third year, and the presence of those individuals would impose costs on the states. There would be direct economic costs in the form of licensing, and this would also include the *parens patriae* injuries of our citizen workers and costs from additional social services.

So what do plaintiffs seek to accomplish through this motion? Plaintiffs merely seek permission to conduct early discovery in this matter. As this Court is aware, before defendants filed their March 3rd advisory, the parties agreed to stay the meet and confer requirements to develop a schedule for trial on the merits pending resolution of the motion to stay the injunction. As a result, a motion for early discovery and a granting of our motion would allow plaintiffs the opportunity to conduct limited discovery on the issue of the implementation of expanded DACA and the extent of the plaintiffs' representations and prior assurances to this Court that that program would not be implemented during the pendency of this litigation.

We want discovery focused on the representations that the attorneys for defendants made to the Court. This type of discovery would help us learn how the states have been injured and help us ensure that the information that we are receiving from the attorneys for defendants is, in fact, reliable.

[12]

Additionally, we would like discovery on how many three year terms of DACA, the three year expanded deferred action benefits were handed out to the individuals, when those have been issued, and when USCIS received those applications with respect to the November 20th DHS directive. All of this information would enable the plaintiffs to learn more information regarding implementation of expanded DACA and would assist them in determining the scope of any future remedial relief that they may seek from this Court.

And with that, Your Honor, the plaintiffs would request that the Court grant their motion for early discovery and allow them to seek this information from defendants.

THE COURT: Let me—let me ask you a question, Ms. Colmenero. Say I grant your request. And let's say what you find out is exactly what you just argued, you know, that okay, they misrepresented the facts to the Court. In that time period that they misrepresented facts to the Court, 100,000 people or maybe more—I mean, I understand why you want to find out how many, but let's say that's all—let's say it's all true. What then?

MS. COLMENERO: Well, Your Honor, defendants need this information in order to better assess what further relief that they may seek from the Court. I believe our concern is really geared more towards the preliminary injunction that this Court issued and ensuring that there has, in fact, been compliance [13] with it and ensuring that everyone is on the same page in terms of what plaintiffs challenged in this lawsuit and what this Court enjoined and ensuring that everyone is complying with the terms of the preliminary injunction order as this case moves forward.

THE COURT: The theory being that if they made these representations on three different occasions to the Court and these representations were not true, how do you know they're complying with the injunction?

MS. COLMENERO: Exactly. And ensuring reliability from these representations to the Court will impact the relief that we may seek, which may include a motion to modify the preliminary injunction if it is unclear

that it applies to certain aspects of the DHS directive. It may include modifying the preliminary injunction to impose reporting duties from the defendants to ensure compliance. Or depending on whether the facts show a concern more than just unreliable information or a breach of the duty of full disclosure, perhaps sanctions.

But there are a multitude of issues that we need to learn more about in order to inform the scope of the remedial relief that the plaintiffs may seek in the future from this Court.

THE COURT: Okay. All right. Thank you.

Ms. Hartnett?

MS. HARTNETT: Thank you, Your Honor. On behalf of the government, I would like to first of all apologize for any [14] confusion that our representations created in the case, and we are—of course stand ready to answer any questions that the Court has or to provide additional information that would be helpful to the Court in understanding what happened here. I'm—also just wanted to inform the Court that we do intend to submit a written opposition to the plaintiffs' motion for discovery which is due mid next week.

I—you know, happy to answer any specific questions. What I would say is that these were grants of deferred action under the 2012 criteria that existed before the 2014 memorandum came out.

THE COURT: Tell me how that is.

MS. HARTNETT: Yes, Your Honor.

THE COURT: First of all, let me read the first sentence to your advisory. This is what you filed with the Court. "Defendants file this advisory to inform the Court of certain actions that U.S. Citizenship and Immigration Services took pursuant to the November 20th, 2014." That's DAPA.

MS. HARTNETT: Your Honor, we—I completely agree with you and would not dispute that the three year period versus the two year period deferred action, the genesis of that was the 2014 memorandum. I think—I do think that the basis for this confusion, and I do apologize for it on behalf of my client and our team, is that we were —when we were talking about applications being accepted for expanded DACA, that would be the [15] actual harm that's being alleged in this case of expanding the universe of people who will be eligible to receive deferred action. As the state here said, the case is about 4 million, up to 4 million new people who may be able to receive benefits. That was the harm that we were focused on. Therefore, the dates that we were providing to the Court were when applications would be accepted for that expanded group to join—to seek deferred action.

THE COURT: We talked about that at the hearing. I mean, I—Ms. Colmenero's predecessor actually misspoke because I asked, "Does this concern DACA at all?" And he initially told me no, and then caught himself and went back and said, "No, this includes the—the amendments that are contained in the November 20th, 2014 letter."

And then I asked, "You mean like the expansion of the years?" And everybody agreed that was it.

And then you said, "It's not happening."

MS. HARTNETT: Your Honor, I certainly don't want to take issue with your—I have looked closely at the transcript, and I don't think that the issue of the three year to two year grant came up during that hearing or I would have immediately brought to the Court's attention this issue. Again, I think we were focused on, because the entire crux of the claim of irreparable harm here, was that people were going to start getting DACA and eventually DAPA that didn't get it before.

[16]

I actually don't take issue with what Ms. Colmenero—I mean, we don't dispute that the state is challenging the memo in full. And we certainly appreciate the Court's injunction order applies to the memo in full. And if I may, I would explain the reason why this came to our attention and that we promptly brought this to the Court's attention once we realized that we have inadvertently caused confusion. Was—the Court's injunction order is very clear that it—it mostly—obviously the Court's opinion focuses on DAPA. At the end it says DACA as well, to the extent that there are revisions. And your order says clearly "any and all aspects or phases of the expansions, including any and all changes to DACA."

In the course of—that would mean that to the extent that the agency was issuing three year grants rather than two year grants pursuant to the terms of the November memo, that had to cease.

THE COURT: And that's what brought it to your attention?

MS. HARTNETT: Yes, Your Honor.

THE COURT: So you waited three weeks to tell me you were doing it?

MS. HARTNETT: Your Honor, I would say this. We also—I think that the state does direct your attention in their filing to a footnote in our—in our motion for a stay that we filed with this Court, and I'm not—I'm not sure—I think [17] that that indicates even by February 23rd, I believe, which was the date of that motion, we were still not focused on this issue. That footnote talked about that there were some cases in the pipeline, people who were trying to apply for 20—I'm going to call it 2014 DACA. I'm trying to use clear phrases but also ones that are not too long. But for the people under the new 2014 criteria had been applying before the February 18th deadline. Those were not being processed, accepted or touched by the agency until—or processed in any way by the agency pending the outcome of this hearing with this Court.

On the other hand, they were there. And if the Court had allowed the program to go forward, could have been processed as 2014 DACA applications.

And so this—what my point here is, that footnote again on February 23rd indicated to the Court that there were some 2014 applications waiting to potentially be acted on, but again did not draw the Court's attention to the fact that there had been these three year grants because I would just represent to the Court—and this is certainly our—these were part of the 2012 application process

which had a different form, was being processed pursuant to the existing infrastructure, and the big change that was going to occur from the perspective of the agency and, frankly, from the perspective of the harms being alleged here, was the roll-out on February 18th of the new application form. There would have been a whole new apparatus [18] in place to accept the expanded class of people.

So all I can tell you, Your Honor, is that is—that is what we were trying to convey to the Court accurately because the Court's opinion, as it noted, said that it would be—it was unclear from the face of the November 20th memo what exact date expanded DACA, meaning people who met the broader criteria, could apply on. It gave a number of days rather than a date.

And so when we were telling the Court the February 18th was the date, not February 20th as it could have been under the timing in the memo, that is the date that we were trying to explain to the Court.

THE COURT: Well, and I took that date to heart. I mean, that's why I—I mean, my injunction came out on the 16th. In fact, it came out late the night of the 16th because I was trying to meet the deadline you set.

MS. HARTNETT: Yes, Your Honor. And we—we—again, without trying to—we apologize for the confusion because we were focused, as were the plaintiffs, frankly, and as the Court was on the irreparable harm that was being alleged. And the irreparable harm had to do with new people being eligible for those benefits, new people possibly getting driver's licenses. There was no —and I just think it does—it is telling, again, without

trying to under—you know, without trying to de-minimize any confusion that we may have caused, that the state did not point out any harm from three year versus two year [19] grants in its preliminary injunction papers. So even assuming, as the state says—

THE COURT: That's because like the judge, the state thought it wasn't happening because you and Ms. Freeny told us nothing is happening. I mean, that was the term, "nothing." I said, "So you're telling me nothing is happening?" And you basically said, "Yes, that's what I'm telling you." So like an idiot, I believed that.

MS. HARTNETT: Your Honor, certainly we don't think that. And I do—I would say that what my point was actually about the—about the—about the—the point is that we were focused on when the expanded group of people would be getting eligible to get the benefits.

And my point about the irreparable harm in the papers, I think I'm trying to make a point separate from what you're indicating there, which is if there were independent irreparable harm from going from two years to three years, even if the state thought that wasn't currently happening, which again, without trying to dispute whether that was or was not the state's understanding, one would have expected somewhere in the papers to see an explanation of harm from that. And the fact that that wasn't a focus of the harm, it wasn't a focus of the argument, it wasn't a focus of any of our preliminary discussions is why the government was focused on the date new people could apply. And we were trying to provide the best and most accurate [20] information to the Court on that question, and that was accurate. February 18th was

the roll-out date. There was a big apparatus in motion, and that was brought to a halt on the morning of February 17th because we take your order extremely seriously.

As part of that compliance, it also became clear that the three year to two year—the grants from two years to three years which were—flowed from the November 24th memorandum—I don't dispute that—also had to immediately cease, and that was what was directed throughout the organization.

THE COURT: All right. And the state is basically saying—and you can just tell me now. You don't have to file something. Why do you think she's not entitled to find out: Look, Judge, we've—we relied on representations before, and those representations turned out not to be true. We want to make sure we can rely on the representations we're getting now.

MS. HARTNETT: Your Honor, I would submit at least two things in response. One is we obviously strive to be as candid as possible and provide the Court with all relevant information. It truly became clear to us that there was potential confusion on this point. This was not an area of focus. This is not something that we did not want to answer the Court's questions if it had it. It was simply not the harm we were focused on, which was new people getting it. So I would say this is—there was not any record of unreliable representations here [21] except with respect to this one potential confusion that we brought, promptly brought to the Court's attention when it came—became evident to us that we may have created confusion.

And so I would just say the fact that we filed an advisory to make clear the facts to the Court should not be used as the toehold to have further discovery. And I can tell you myself that I'm happy and the team and our client is happy to provide the Court with information that it would find useful to—to satisfy itself of that.

I think discovery is a separate question and is not the proper course for addressing any concerns that the Court may have.

I also would note that when they called and let us know that they were going to be filing their motion, we did attempt to confer with them to figure out if there was certain specific information that they requested that would be useful and stave off a separate discovery issue here in this case, and we did not—that engagement did not occur. And also the harms that were being set forth here for the first time in this case—first time was on the PowerPoint today about the alleged harm from the three year to two year grant.

So again, I think there's a separate—there's two issues as they've identified. One is can you trust what the government is telling you? And I'm saying to you, Your Honor, with full respect and apologies for the confusion that we have caused that [22] yes, you can. And that we brought this issue to the Court's attention promptly. I think there's—

THE COURT: I can trust what you're saying, is what you're saying, yes?

MS. HARTNETT: Well, yes. And, Your Honor, I do think—

THE COURT: I can trust what Secretary Johnson says?

MS. HARTNETT: Your Honor, you can. And I may—

THE COURT: I can trust what the president says?

MS. HARTNETT: Your Honor, we—the—

THE COURT: That's a yes or no question.

MS. HARTNETT: Of course, yes. Yes, Your Honor, of course.

THE COURT: Okay.

MS. HARTNETT: And we are striving to provide the Court with accurate information. We did not—the government did not implement the revised DACA as we understood that term meaning, the expansion of this deferred action to potentially 4 million new people before the Court ruled. That was the crux of this case, that was the crux of their focus of harm, and we were doing our best to let the Court know when that would happen so that the Court could, as you've noted, timely rule and prevent that from taking effect if the Court so saw fit.

THE COURT: All right. Let me ask you a question because I asked Ms. Colmeneri. And if I mispronounce your name, [23] I apologize. Colmenero. Basically the same question.

So let's say everything they say is true. What do you think I ought to do?

MS. HARTNETT: Right. To the extent, Your Honor—I mean, they say a lot of things. I mean, to the extent there was a—I guess to the point of—if they were able to establish—

THE COURT: Let me—I'm taking it to the full extreme of what that—let me—if I find that the government misrepresented the facts that the states relied on, that the Court relied on it, what should I do? Nothing?

MS. HARTNETT: Your Honor, I think I do have an answer for you on that. Thank you for framing the question that way. I think that to the extent the Court believes that it issued its preliminary injunction ruling and that the briefing was—occurred without full information that was relevant to the Court, the proper remedy here would be to do supplemental briefing on the specific issue of should there be additional relief ordered by the Court for the three year grants that occurred during the relevant period.

THE COURT: Should I order sanctions?

MS. HARTNETT: No, Your Honor, you should not. And I would note that that's not been something that was teed up for this hearing, either in your order, in their motion.

THE COURT: She brought it up in her argument.

[24]

MS. HARTNETT: That's correct, but we would deserve full notice of whatever—whatever type of relief was being sought there, given the severity of that type of relief. And moreover, I would say there was absolutely no

basis for sanctions here. The government was trying to do the right thing by bringing to this Court's attention an important fact that the Court may find important and that we realize may have inadvertently been left out of the presentation of this case.

But I think what is—the key here, though, is that for there to be some additional relief here, and I'm talking about whether something should be done to transform the three year grants into two year grants and consistent with what the government has told this Court, there are options for taking relief to accomplish that because we—as we told the Court, these grants are revocable. They can be taken back. These are all people that would have had two year grants if they had—

THE COURT: My span of options—my span.

MS. HARTNETT: Yes.

THE COURT: Not what y'all can do, but what I can do. I mean, I can do nothing on one hand. I can strike your pleadings on the other. I mean—

MS. HARTNETT: I think there's a third—

THE COURT: I mean, Judge Ellison in Houston in the Tesco Corporation case, I mean, he granted a dismissal with prejudice against a person that had—or a company that had won [25] a lawsuit.

MS. HARTNETT: Your Honor, I think that would be wholly unwarranted here. For example, I—I think this would be a different situation, for example, if the government had been implementing the expanded class and giving new people access to deferred action during

the relevant time period. That did not happen. These are all people that would have received two year grants anyway under the old criteria. I do think—

THE COURT: Go ahead, finish.

MS. HARTNETT: To be constructive, though, I do think that if there is a true allegation here of harm that the state is facing due to the hundred thousand—I can—it's 108,081 grants during the relevant time period. If there was a harm that the state is facing from those, the proper course would be for Your Honor to receive briefing on the harm and to issue an order. And if the order were to require some sort of a remedial action on behalf of the government to unwind those three year grants, the government of course would—would receive that court's order.

THE COURT: What about attorney's fees? Should I order attorney's fees?

MS. HARTNETT: Your Honor, I would—we would—

THE COURT: I mean, but that's—

MS. HARTNETT: No.

THE COURT: —certainly an option. Let me ask you [26] this. If I order attorney's fees, who pays it?

MS. HARTNETT: Well, the United States.

THE COURT: Well, United States taxpayers pay it, right?

MS. HARTNETT: Your Honor, I—again, I—we have this—

THE COURT: Well, answer my question. The United States taxpayers?

MS. HARTNETT: Ultimately, yes.

THE COURT: All right. So that means that the states, the people that have already suffered the damage, if there is damage, actually end up paying their own sanctions, right?

MS. HARTNETT: In that respect, Your Honor, yes, but—

THE COURT: Okay.

MS. HARTNETT: Again, I—we're happy—these are all issues that are far beyond what is sought in the motion that is at issue today. And, frankly, the government has not had a chance to brief that or even hear what the allegations would be against it.

But what I'm telling you is that we do—we take seriously the notion that if the Court finds there to be a reason for further briefing or further potential relief for the state based on harm that the state could establish from those three year grants, we of course would be welcome to —willing to do that.

But I think—I don't—without again minimizing the confusion, there has been no allegation throughout any of the [27] proceedings in this case that the three year grants are some way harmful.

THE COURT: Okay. I'm just saying I'm doing this on the assumption she's right.

MS. HARTNETT: I'm saying that even if she is right, the question then would be, okay. There was a—there—assuming that there was a mistaken information before the Court and that was the fault of the government, what do you do with that? And I'm—what my point here is I believe that they would have a chance perhaps to show that it was material and that they should get an additional injunction. The other injunction of course is already up before the Court of Appeals, and we would of course be willing to brief that issue for the Court.

THE COURT: All right. And what I asked you about if I awarded attorney's fees, the same would be true if I fined somebody or fined the government or if I awarded some kind of damages. I mean, what would happen is the taxpayers would end up having to pay that, correct?

MS. HARTNETT: Essentially, Your Honor, yes.

THE COURT: All right. So the states would end up having to pay their own damages, the taxpayers of the states, correct?

MS. HARTNETT: Yes, Your Honor.

THE COURT: All right. Let me switch over on a different topic while I have you.

[28]

MS. HARTNETT: Yes, Your Honor.

THE COURT: Because you have a pending motion in front of the Court, a motion to stay.

MS. HARTNETT: Yes, Your Honor.

THE COURT: One of the things that was new, and I—the state has objected to this, but I want to ask you while I have you here about it. There was an affidavit from—and I will butcher this name too as well—Kerlikowske?

MS. HARTNETT: That's accurate, yes. That's correct.

THE COURT: All right. And he's basically laid out, and maybe it's laid out other places, but it's probably in his affidavit the most succinctly, the way that DAPA or DACA, for that matter, helps them.

And the—and what I'm asking you is if—the way I understood his affidavit is because these individuals will be issued some kind of license or card or ID or something like that, that if a Border Patrol or an ICE agent stops a person, they can show them their card, and they'll know that they don't have to pursue that person. Am I reading his affidavit right?

MS. HARTNETT: Yes, Your Honor.

THE COURT: Okay. All right. My question is, why aren't you doing that now? I didn't enjoin you from doing that. You could issue them some kind of form that says, "We're not prosecuting this person."

MS. HARTNETT: Your Honor, I think the people that [29] receive deferred action receive more than a slip of paper that is their deferred action approval, and they also receive an employment authorization document. I think the employment authorization document is a recognized secure type of ID.

THE COURT: My question to you is, you could say we have a bunch of folks here that other than being in the country illegally are fairly law abiding. They—as Secretary Johnson says in the memo, they may be working, they may be supporting their families. They may be doing all the things that we would hope they would do other than being in the country illegally.

There's nothing that's stopping the Department of Homeland Security from saying: All right. We want those people. Come forward. We're going to do a background check on you, and we'll give this card that says for three years we're not prosecuting you. We're not going to—we've got higher priorities. I mean, y'all could do that right now.

MS. HARTNETT: Your Honor, yes. That was not the judgment of how to do the program, but that's an alternative.

THE COURT: I know. But, I mean, you could—if you wanted, even with my injunction in place, you could satisfy all those security needs without issuing legal presence and without giving them tax benefits and employment authorizations and Social Security. I mean, that came up in the news. Can you—are they going to be eligible for Social Security benefits?

MS. HARTNETT: Your Honor, under existing law, the [30] people that get deferred action end up having a number that could allow them to later on—basically account for their income in the meantime to put it on the books.

But may I just add to that? Not to get into a—do more argument than Your Honor would want. I think an incentive for this pro—the reason why deferred action in the department's judgment works in a way that's different than the prosecutorial discretion is it does provide an incentive for people to come out and identify themselves. The ability to work—and again, I know—I understand Your Honor may disagree under existing regulatory and statutory structures, but work authorization is a large incentive for getting people to be able to come out of the shadows, as it said, and to identify themselves.

I think that the idea would be to make sure that we're having people identify themselves and have a ability to work legally while they're in that period of deferred action. So that would be a difference from the way Your Honor was proposing it.

THE COURT: Well, it would be a difference. But what you're saying is basically we have to—I mean, just an offer to stay in the country without being prosecuted, we have to give them some extra incentive? I mean, we're basically bribing the people to stay in the—stay in the country legally?

MS. HARTNETT: I'm not saying that, Your Honor. I think—again, this is just a matter of—I believe that the [31] law enforcement officials that run the Department of Homeland Security had made the judgment that the right way to get people to come out, account for themselves, be accountable for their work, be on the rolls, have the tax taken out of their income, this is the judgment that this program is the one that would most successfully on a proper scale to actually achieve the effi-

ciencies that come from having a program like this, I think the judgment has been made that that's the way that the program would best work.

THE COURT: Okay. And the population you're talking about is greater than the population of 26 states?

MS. HARTNETT: So I'm not sure—

THE COURT: Four-and-a-half million people, fair estimate?

MS. HARTNETT: That's the estimate under both DACA and DAPA of who would be eligible to apply. Of course, not everyone applies or receives it.

THE COURT: Okay. All right. Let me switch gears because there's one other thing that I think was—and again, it may not have been new, but it was set forth different.

At one point in your motion, you suggest that I ought to apply the injunction only to Texas?

MS. HARTNETT: Yes, Your Honor.

THE COURT: I mean, isn't that contrary to every immigration argument that the government has ever made? I mean, [32] can you think of a case where the government has ever argued that there ought to be special rules for states? I mean, haven't they always argued that immigration ought to be uniform across the board?

MS. HARTNETT: As a general matter, yes, Your Honor. And I believe that would be the best way for this program to be applied. On the other hand, there are examples that I—I can bring them to the Court's atten-

tion if it would be useful. I'm not fully prepared to discuss them here. Where there are pilot programs with certain states or localities in which the immigration laws are applied differently. I think the point of the case law in this area is that it's the federal government's—it's up to the federal government to determine when and how that will be appropriate.

And so in this case like in other cases involving pilot programs or places where the federal government has chosen to have differential application of the law, I think the judgment is the benefit of that would outweigh the—any downside; and, frankly, that it would at least accomplish some of the important goals that the government is seeking to achieve.

THE COURT: Why not do it for the ten states that are in favor of it, at least by amicus, and not do it for the 27 states that are plaintiffs? We have a lawyer here from Indiana. He's one of the plaintiffs. Why not do it for all 27 states?

MS. HARTNETT: Well, again, Your Honor, I appreciate the [33] question. I think our point of view is that the best way to do the program and the way that the law enforcement officials at the Department of Homeland Security believe was the best was to do it on a nationwide basis. I think the reason why we argued for limiting it to Texas in our motion for a stay was that the evidence that came in at the preliminary injunction phase as supported at most an injunction with respect to Texas. As to an alternative program that would only be directed at states that chose to be part of it, that certainly is another policy option, but is not the one we're defending here because

the law enforcement officials chose a program that would apply nationwide and deliver the highest benefit and national security benefit from their perspective.

THE COURT: I'm shaking a little bit. I know you're not from Texas, but the current slogan for the governor's tourism office is, "It's like a whole other country." This would play right into it. You might get his support for that.

Let me go back and seriously ask. I mean, doesn't the constitution contemplate a uniform law, Article I of the constitution?

MS. HARTNETT: Your Honor, as a general matter, yes. But as I'm pointing out, there have been pilot programs and other—and other—and other initiatives that are directed at certain communities, and we would be happy to provide the Court additional authority on that if you would find it useful.

[34]

THE COURT: All right.

MS. HARTNETT: But again, I'm just now back to the discovery for one further point, is that we would not only seek the ability to file a written opposition, which would provide some of the legal analysis that we haven't covered here also, but, you know, we also would want to maintain the ability to object to any discovery requests that—the specifics of any discovery requests. Because as the Court may be aware, there are some sensitivities of privilege and other things that were implicated by what they—what they said.

I guess one other—not to dig my hole any further, but I actually wanted to add one other. This didn't come out in the questioning that you have here, but I also wanted to bring to your attention one other thing. I had meant to kind of go through the activities that the DHS officials took right after your injunction to make you feel comfortable that we had been immediately implementing them.

The secretary issued a directive on Tuesday, a statement saying we would comply fully. The USCIS, head of USCIS also issued an email to the field that day on the 17th saying that we would have full compliance. The other two components also issued emails to the field the next day because they have some, as you know, interaction with the deferred action, even though they don't principally run the program.

And there's been some talk in the news about facilities and [35] employment of people for gearing up for DAPA. All of that ceased, and resources have been directed to other places. In addition, there have been obviously all the forms and things that were going to go up on the website on the 18th did not go up. Things that had—publicity that had been out there, including existing websites had banners added to them to make clear that the program was not taking effect.

And also I just would note with respect to the three year to two year grants, immediately as of the 17th, that did cease. The USCIS centers were told not to process any more three year to two year grants, and that included—there were about 750 that were in the pipeline that day that were about to go out the door with the three year cards, and those were pulled back, and so those were only

issued as two year cards, even though some of those people had gotten notice that they would get three years.

We have been consulting with our clients, determined there were about 55 cards that have gone out as three year terms since the Court's injunction. That those were a result of what appears to be just manual error, having the three inserted in the system rather than two. And the department has actually in its system corrected those, and those are now two year grants of deferred action, but those were not in any way—those were—is an error and contrary to the directive from the top of no more three year cards as of February 17th.

THE COURT: I hope you notified the recipients of that.

[36]

MS. HARTNETT: We're in the process of taking full corrective action, but I just wanted to bring that to the Court's attention because again, we really had no—no intent and certainly no—no intent to withhold any of this material from the Court. It simply was not the focus of the harms that were at the crux of the PI motion.

THE COURT: All right. Ms. Colmenero, you want to add anything?

MS. COLMENERO: Sure. Just a couple of points, Your Honor.

Just to clarify, our motion for early discovery is simply asking the Court the ability to take—to conduct some early discovery. We're not asking for any specific form of remedial relief. This is information that we have learned

about that we find surprising, we find concerning, and we would like to learn some more information about it. And there is a mechanism to do that, and that's through discovery. And Rule 26(d) allows for parties to conduct early discovery when there is good cause. And this situation here presents good cause in which to take early discovery because clearly there was some confusion in terms of what plaintiffs were challenging and what—in terms of the expanded DACA and the three year grants of deferred action compared to the two year renewal grants.

I want to be clear that we disagree that the only—that the only harm that would have flowed would be to new DACA [37] applicants. There is irreparable harm that flows from the issuance of the three year deferred action grants under the expanded DACA program. And the reason is is that—and we told the Court that. On page 26 of our motion for preliminary injunction, we specifically mentioned that an expansion of the DACA program which would include the change from the two year deferred action period to the three year deferred action period would cause new waves of immigration in the plaintiff states and in the country. And that was irreparable harm that we were seeking to prevent with the preservation of the status quo. So we have always been concerned about the harm by the expansion of DACA as set forth in the 2014 DHS directive.

In terms of that there's not—I just want to reiterate that we don't—we disagree with defendants that there is not—that there's really no distinction between two year deferred action renewals and this expansion of DACA with the three year grants. As we set forth in our argu-

ment earlier today, there is irreparable harm that does flow from the states from this—these three year grants.

And in particular, it is the issuance of driver's licenses. It is the new waves of immigration. It is an additional incentive that it creates with individuals who may want to immigrate here to the United States or want to apply for this additional benefit.

THE COURT: Well, just as a matter of course here, let [38] me stop you.

MS. COLMENERO: Okay.

THE COURT: I mean, I basically ruled against you on the new wave of immigration argument, didn't I?

MS. COLMENERO: Yes, Your Honor. But we do think that—and even though you ruled against us and we —you know, we support the preliminary injunction that Your Honor did, in fact, issue, this is irreparable harm.

THE COURT: So you liked the part where I ruled for you, and you didn't like the part where I ruled against you?

MS. COLMENERO: Well, this is a harm that the plaintiff states continue to feel, and we do want to make that—that—we wanted to preserve that point with the Court. And that even with this additional information, there is still irreparable harm that just cannot be cured by changing these three year grants to two year grants.

And I just want to conclude by saying, you know, we understand that this is a big, complex federal program. And I guess it's not surprising to us that there may have been less than stellar communication between the on-the-

ground folks and the attorneys. But in light of the incomplete information that has reached this Court and the plaintiffs so far, and in light of the complex nature of this entire program, we need some additional information, we need some documents, and not just the words of a few attorneys from the Department of Justice in order [39] to detect and address at an early opportunity whether any further implementation is occurring or further irreparable harm is occurring.

And for that reason, Your Honor, we would request that this Court grant our motion for early discovery.

THE COURT: Ms. Hartnett, anything you want to add?

MS. HARTNETT: Just about two quick points. Just to the—I wanted to briefly respond to the suggestion here for the first time that the—having the grants be three year sort of incentivizes people to apply more. And just for the Court's awareness, and we're happy to provide this more officially if the Court would like it, of the 108,081—this is based on our best—obviously information that we have today. Of the 108,081 three year grants that occurred during this time period, 94,681 were applications that were submitted prior to the November 20th memo. And so I don't think there's a basis, although we could obviously provide that further in writing if the Court would find it useful—

THE COURT: How did they—how did they apply for a three year grant—

MS. HARTNETT: They just applied—

THE COURT: —before—before the November 20th memo? That's what created the three year grant.

MS. HARTNETT: Sorry to interrupt, Your Honor. Yes. No, they just were applying for DACA under the 2012 criteria. [40] And then effective November 24th from the memorandum, those became three year grants. So I just wanted to bring that fact to the Court's attention.

And on the point about communication that the—that the other side alluded to regarding our relationship with our client, all I would tell the Court again, as I said earlier, was that we strove to provide the Court accurate information on all issues of focus, and that was not an issue of focus. But I just didn't want to let stand the notion that we wouldn't be able to get accurate information from our client and provide it to the Court if the Court needed that from us.

THE COURT: All right. All right. Thank you, counselors. I'm going to rule on this and the other pending motions promptly. I mean, obviously I've heard them. If there's any remedial things that I order, we'll take care of that here. And obviously during the pendency of that, the appeal will go up, and you can discuss that, the merits with the Fifth Circuit.

I don't see a need, Ms. Hartnett, unless you just want to file a response to her motion, because you basically just argued your response. Her motion for discovery. But if you want to file it, you need to do it like in the next 48 hours.

MS. HARTNETT: Your Honor, we will do so just on the good cause standard. There's some law we would like to provide you as well.

[41]

THE COURT: All right. Because I don't think it's fair to anybody to let this linger. It—you know, I've given it my best shot. It's time to let somebody else give it their best shot.

All right. Thank you, counsel. We'll stand adjourned.

(Court adjourned.)

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil No. B-14-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Apr. 7, 2015

ORDER

The Plaintiff States[1] (hereinafter "Plaintiffs" or "States") have filed an Opposed Motion for Early Discovery, alleging that certain misrepresentations were made by counsel for the United States and the various

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[1] The Plaintiffs include: the State of Texas; State of Alabama; State of Arizona; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of Nevada; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Utah; State of West Virginia; State of Wisconsin; Attorney General Bill Schuette, People of Michigan; Governor Phil Bryant, State of Mississippi; Governor Paul R. LePage, State of Maine; Governor Patrick L. McCrory, State of North Carolina; and Governor C. L. "Butch" Otter, State of Idaho.

officials of the Department of Homeland Security (hereinafter "DHS") who are defendants in this matter (hereinafter "Defendants" or the "Government") [Doc. No. 183].[2] The Government has filed its Opposition thereto [Doc. No. 207], and the States have filed a Reply [Doc. No. 209]. This Court held a hearing on the States' Motion on March 19, 2015.

The States' discovery motion stems from one of the most recent pleadings filed by the Government entitled "Defendants' Advisory" (hereinafter "Advisory"), where, in pertinent part, the Government disclosed to the Court and the States the following:

> **DEFENDANTS' ADVISORY**
>
> Defendants file this Advisory to inform the Court of certain actions that U.S. Citizenship and Immigration Services ("USCIS") took pursuant to the November 20, 2014 deferred action memorandum at issue in this case before the Court issued its preliminary injunction on February 16, 2015. Defendants do not believe that the preliminary injunction requires them to take any affirmative steps concerning those pre-injunction actions, but Defendants nevertheless wish to ensure that the Court is fully aware of those actions.

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[2] This Court previously denied a Motion for Leave of Court to File a Motion Seeking an Order to Show Cause [Doc. No. 160] based upon the same alleged misrepresentations. The Court denied the motion because it was filed by an *amicus curiae* and not by a party to this action. It is beyond the role of an *amicus curiae* to file substantive motions.

* * *

Out of : abundance of caution, however, Defendants wish to bring one issue to the Court's attention. Specifically, between November 24, 2014 and the issuance of the Court's Order, USCIS granted three-year periods of deferred action to approximately 100,000 individuals who had requested deferred action under the original 2012 DACA guidelines (and were otherwise determined to warrant such relief), including the issuance of three-year EADs for those 2012 DACA recipients who were eligible for renewal. These pre-injunction grants of three-year periods of deferred action to those already eligible for 2012 DACA were consistent with the terms of the November Guidance. Deferred Action Guidance at 3; *see also* Neufeld Decl. ¶ 12 n.6 ("Pursuant to the November 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA requests and requests for renewal now receive a three-year period of deferred action.") [ECF No. 130–11]. Defendants nevertheless recognize that their identification of February 18, 2015, as the date by which USCIS planned to accept requests for deferred action under the new and expanded DACA eligibility guidelines, and their identification of March 4, 2015, as the earliest date by which USCIS would make final decisions on such expanded DACA requests, may have led to confusion about when USCIS had begun providing three-year terms of deferred action to individuals already eligible for deferred action under 2012

DACA. *See, e.g.*, Defs.' Mot. for Extension of Time to File Resp. to Pls.' Prelim. Inj. Reply Mem. at 3.

[Doc. No. 176 at 1, 3 (emphasis added)].[3] The only way to interpret this Advisory is that, despite the Government's multiple assurances that no action would be taken prior to February 18, 2015, in reality, between November 24, 2014, and February 16, 2015, the DHS granted approximately 100,000 applications[4] pursuant to the revised DACA, the terms of which were established in the 2014 DHS Directive that is the subject of this suit. Indeed, the opening sentence of the Advisory notes that these actions were taken "pursuant to the November 20, 2014 . . . memorandum at issue in this case." [*Id.* at 1]. Counsel for the Government confirmed this interpretation in open court.

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[3] "DACA" is the acronym for Deferred Action for Childhood Arrivals. "DAPA" is the acronym for Deferred Action for Parents of Americans and Lawful Permanent Residents. DAPA was created by the November 20, 2014 Memorandum issued by DHS Secretary Jeh Johnson (hereinafter the "2014 DHS Directive" or "Directive"). The 2014 amendments to DACA (or "revised DACA") were also established in the 2014 DHS Directive.

[4] Counsel for the Government at the hearing on March 19, 2015, indicated that the actual number was 108,081. [Hr'g Tr. 25, Mar. 19, 2015]. This number, according to the Government, does not include the fifty-five applicants who counsel told the Court mistakenly received benefits pursuant to the revised DACA after February 16, 2015—the date the Order of Temporary Injunction was issued. Counsel for the Government voluntarily promised the Court that the applications granted after the February Injunction would be rescinded.

This Court expects all parties, including the Government of the United States, to act in a forthright manner and not hide behind deceptive representations and half-truths. That is why, whatever the motive for the Government's actions in this matter, the Court is extremely troubled by the multiple representations made by the Government's counsel—both in writing and orally—that *no action* would be taken pursuant to the 2014 DHS Directive until February 18, 2015. At the January 15, 2015 injunction hearing, the Court established through counsel for both sides that revised DACA as set forth in the amendments contained in the 2014 DHS Directive were indeed at issue in the case. [P.I. Hr'g Tr. 90–92, Jan. 15, 2015]. Thereafter, the following exchange between the Court and counsel occurred in response to the Government's request for time to file a sur-reply to Plaintiffs' pleadings on the temporary injunction:

> **THE COURT:** I'm a little concerned about how much time you asked for. If I give you until the 28th [of January 2015], can you work with that?
>
> **MS. HARTNETT [Counsel for the Government]:** Let me confer with my co-counsel, but I believe so.
>
> Your Honor, in part we're just discussing about the need to respond to some of the voluminous factual material. If we could have until the 30th, that Friday, that would be preferable.
>
> **THE COURT:** Okay. And then what is the—I guess to preempt Mr. Oldham **[Counsel for the States]** when I ask him does he have any problem

with that, he's going to want to know what's happening when?

MS. HARTNETT: And we set this—we did file yesterday afternoon, Your Honor.

THE COURT: I can't find it.

MS. HARTNETT: My apologies.

THE COURT: No, no. It's here. I just buried it with all my paper.

MS. HARTNETT: In that document [Motion for Extension of Time, Doc. No. 90] we reiterated that no applications for the revised DACA—this is not even DAPA— revised DACA would be accepted until the 18th of February, and that no action would be taken on any of those applications until March the 4th.

THE COURT: And nothing is happening on DAPA?

MS. HARTNETT: So the memorandum said that DAPA should be implemented no sooner than mid May, so DACA is really the first—the revised DACA is the first deadline.

THE COURT: Okay. Then you can have until the 30th.

MS. HARTNETT: Okay. Thank you.

THE COURT: Wait, wait. You're being flagged.

MS. HARTNETT: Oh, sorry. Just to be clear, I meant no later than. So the memorandum provides that by mid May, DAPA will be stood up.

THE COURT: Okay.

MS. HARTNETT: But the main—the driver here would be—

THE COURT: But as far as you know, nothing is going to happen in the next three weeks?

MS. HARTNETT: No, Your Honor.

THE COURT: Okay. On either.

MS. HARTNETT: In terms of accepting applications or granting any up or down applications.

THE COURT: Okay.

MS. HARTNETT: For revised DACA, just to be totally clear.[5]

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[5] Thus, the Government's attorneys affirmatively assured the Court that applications for revised DACA (which includes the change from two-year-renewable terms to three-year terms) were not being accepted until mid-February (and action on those applications would not be taken until March). While counsel admitted that these extensions were done pursuant to the 2014 DHS Directive in the "Advisory" [*see* Doc. No. 176 at 1], the Government now seems to take the position that the three-year extensions given on and after November 24, 2014, to 2012 DACA recipients were actions somehow not taken pursuant to the revised DACA terms contained in the 2014 DHS Directive. This position is disingenuous. Nevertheless, even if it were true, the passage quoted here indicates a distinct lack of candor. If counsel knew three-year renewals pursuant to the 2014 DHS Directive were being granted (even if

[P.I. Hr'g Tr. 133–34 (emphasis added)].

Just prior to the exchange quoted above, Plaintiffs' counsel made it clear during that same hearing that the States were seeking to enjoin "the series of executive actions that were taken on November 20, 2014," which would obviously include the revision to DACA increasing DACA's term from two to three years, effective November 24, 2015 (as expressly provided for in the 2014 DHS Directive). [P.I. Hr'g Tr. 91–92]. Counsel for the Government also understood this change to be a contested issue in the case, as evidenced by her statement during the injunction hearing:

MS. HARTNETT: And just to be clear on that last point, . . . there's one directive that the plaintiffs are challenging in the complaint, and that both is directed toward the DAPA program, but also is a expansion or revision of the DACA program. So to the extent that there's a revision or expansion of the group that would be eligible to apply for that, we do understand the plaintiffs to be challenging that.[6]

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counsel viewed these actions as falling outside the umbrella of the irreparable harm claimed by the States), counsel should have disclosed these facts instead of telling the Court that nothing would happen prior to February 18, 2015.

[6] Construing this last sentence in the light most favorable to the Government, to the extent counsel was somehow mentally subdividing the group of putative beneficiaries under the 2014 DACA revisions (and defining the "group" not involved in this case as recipients of 2012 DACA relief applying for renewals), counsel should have been forthright about this. At no time did counsel for either side exclude the 2012 DACA recipients who would be eligible for

THE COURT: The increase in years?

MR. OLDHAM: Your Honor—

MS. HARTNETT: They ask to have you direct and enjoin, and that directive would allow the revisions to the DACA program that we described in our brief.[7]

[*Id.* at 91].

Clearly, if a "clarification" on any ongoing actions taken by the DHS was ever necessary, which of course it was, this was the time. Silence here, and then later during the scheduling discussion, was misleading. Whether by ignorance, omission, purposeful misdirection, or because they were misled by their clients, the attorneys for the Government misrepresented the facts. The Court, relying on counsels' representations, not only gave the Government extra time for its briefing, but it also took February 18, 2015, as the agreed-upon date by which to rule on the motion for a temporary injunction.

The specific document to which the Government's attorney referred in her request for more time during the injunction hearing was the Motion for Extension of Time to File a Response to Plaintiffs' Preliminary

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the three-year renewal under the 2014 DHS Directive from what was being challenged in this case. It is—and was—abundantly clear that the 2014 DHS Directive in full is at issue.

[7] The Government describes the Directive in its brief as "revis-[ing] three aspects of DACA. . . . Second, it extended the period of DACA from two to three years." [Doc. No. 38 at 29].

Injunction Reply [Doc. No. 90 (filed on January 14, 2015)]. In that Motion, counsel stated:

> Plaintiffs will not be prejudiced by the two-week extension sought in this Motion, because U. S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015.

[Doc. No. 90 at 3 (emphasis in original)].

Four weeks earlier, in response to a question by Plaintiffs' counsel as to whether any activity pursuant to the 2014 DHS Directive would occur between December 19, 2014, and the anticipated January 9, 2015 hearing,[8] counsel for the Government told the Court:

> **THE COURT**: Okay. Ms. Freeny, do you anticipate that happening?
>
> **MS. FREENY [Counsel for the Government]**: No, I do not, your Honor. The agency was directed to begin accepting requests for deferred action I believe beginning sometime in—by mid-February but even after that we wouldn't anticipate any decisions on those for some time thereafter. So there—I

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[8] The preliminary injunction hearing was originally scheduled for January 9, 2015.

> really would not expect anything between now and the date of the hearing.[9]

[Hr'g Tr. 10–11, Dec. 19, 2014].

As stated earlier, 2012 DACA only provided for two-year terms for both original applications and renewal applications. If 108,081 individuals received renewals for three-year terms, those renewals could only have been granted pursuant to the 2014 DHS Directive (containing the revised DACA), which is the very Directive at issue in this case. That is the same Directive that the Government, when it was seeking more time to file a response, told this Court:

> [N]o applications for the revised DACA—this is not even DAPA—revised DACA would be accepted until the 18th of February, and that no action would be taken on any of those applications until March the 4th.

[P.I. Hr'g Tr. 133]. This representation was made even as the Government was in the process of granting over 100,000 three-year renewals under the revised DACA. In response to this representation, counsel for the States agreed to a schedule more favorable to the Government, and the Court granted the Government's request not only to file a sur-reply,[10] but also to

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[9] Again, there was no mention that the DHS was already awarding three-year extensions under the 2014 DHS Directive to previous 2012 DACA recipients.

[10] Filing a sur-reply is not an automatic right. The Court's local rules do not anticipate any additional or supplemental filings after

have additional time to do so. The States now argue that they would have sought a temporary restraining order, but for the Government's misrepresentations. A review of the Chronology of Events, attached as an appendix to this Order, certainly lends credence to the States' claims.

The explanation by Defendants' counsel for their conduct *after the fact* is even more troublesome for the Court. Counsel told the Court during its latest hearing that she was unaware that these 2014 DACA amendments were at issue until she read the Court's February 16, 2015 Order of Temporary Injunction and Memorandum Opinion and Order (referred to jointly as the "February Opinion"). [Hr'g Tr. 16, Mar. 19, 2015]. Counsel then claimed that the Government took "prompt" remedial action. This assertion is belied by the facts. Even if one were to assume that counsel was unaware that the 2014 DACA amendments in their entirety were at issue until reading this Court's February Opinion, the factual scenario still does not suggest candor on the part of the Government. The February Opinion was issued late in the evening on February 16, 2015 (based on the representation that "nothing" would happen on DAPA or revised DACA until at least February 18, 2015). As the February Opinion was finalized and filed at night,

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the motion, response, and reply are filed. When a party requests briefing beyond the motion, response, and reply, the Court must determine whether, in the interests of justice, the party should be granted leave to do so. *See* L.R. 6D.

counsel could not have been expected to review it until the next day; yet, for the next two weeks, the Government did nothing to inform the Court of the 108,081 revised DACA approvals. Instead, less than a week later, on February 23, 2015, the Government filed a Motion to Stay and a Notice of Appeal. Despite having had almost a week to disclose the truth—or correct any omission, misunderstanding, confusion, or misrepresentation— the Government did *not* act promptly; instead it again did nothing. Surely, an advisory to this Court (or even to the Court of Appeals) could have been included in either document filed during this time period. Yet, counsel for the Government said nothing.

Mysteriously, what was included in the Government's February 23, 2015 Motion to Stay was a request that this Court rule on the Motion "by the close of business on Wednesday, February 25 . . . ."—in other words, within two days. [Doc. No. 150 at 7]. Had the Court complied with this request, it would have cut off the States' right to file any kind of reply. If this Court had ruled according to the Government's requested schedule, it would have ruled without the Court or the States knowing that the Government had granted 108,081 applications pursuant to the revised DACA despite its multiple representations to the contrary. While this Court is skeptical that the Government's attorneys could have reasonably believed that the DACA amendments contained in the 2014 DHS Directive were not at issue prior to the injunction hearing on January 15, 2015, this Court finds it even less conceivable that the Government could have

thought so after the January 15, 2015 hearing, given the interplay between the Court and counsel at that hearing. Regardless, by their own admission, the Government's lawyers knew about it at least as of February 17, 2015. Yet, they stood silent. *Even worse, they urged this Court to rule before disclosing that the Government had already issued 108,081 three-year renewals under the 2014 DACA amendments despite their statements to the contrary.*

Another week passed after the Motion to Stay was filed and still the Government stood mute. On February 24, 2015, this Court gave the States until 5:00 p.m. on March 3, 2015, to file a reply to the Motion to Stay. Still, the Government's lawyers were silent. The States filed their response on March 3, 2015, at 4:46 p.m. CST. Finally, after waiting two weeks, and after the States had filed their reply, the Government lawyers filed their Advisory that same night at 6:57 p.m. CST. Thus, even under the most charitable interpretation of these circumstances, and based solely upon what counsel for the Government told the Court, the Government knew its representations had created "confusion," but kept quiet about it for two weeks while simultaneously pressing this Court to rule on the merits of its motion. At the March 19, 2015 hearing, counsel for the Government repeatedly stated to the Court that they had acted "promptly" to clarify any "confusion" they may have caused. But the facts clearly show these statements to be disingenuous. The Government did anything but act "promptly" to clarify the Government-created "confusion."

Section 3.3 of the ABA Model Rules of Professional Conduct and Section 3.03 of the Texas Disciplinary Rules of Professional Conduct (which are incorporated as the standards for conduct in the Southern District of Texas pursuant to its Local Rules—Appendix "A" Rule 1(B)) require a lawyer to act with complete candor in his or her dealings with the Court. Under these rules of conduct, a lawyer must be completely truthful and forthright in making representations to the Court. Fabrications, misstatements, half-truths, artful omissions, and the failure to correct misstatements may be acceptable, albeit lamentable, in other aspects of life; but in the courtroom, when an attorney knows that both the Court and the other side are relying on complete frankness, such conduct is unacceptable.

Any number of federal judges, given this misconduct, would consider striking the Government's pleadings. *See, e.g., Tesco Corp. v. Weatherford Int'l, Inc., et al.*, No. 4-08-2531 (S.D. Tex. Aug. 25, 2014). Under different circumstances, this Court might very well do so. The Court, however, finds that the issues at stake here have national significance and deserve to be fully considered on the merits by the Fifth Circuit Court of Appeals and, in all probability, the Supreme Court of the United States. If this Court were to strike the Government's pleadings at this juncture, the case would be over. The Plaintiffs would prevail by default. The Court finds at the present time that the ends of justice would not be served by striking plead-

ings in this case.[11] Such a ruling would not only penalize those with an interest in the outcome, but would more importantly penalize the country, which needs and deserves a resolution on the merits.

That does not necessarily leave this Court impotent to fashion an appropriate remedy or sanction. Nevertheless, before it does so, it must first be able to determine the extent to which remedial action or sanctions are appropriate, if at all. Consequently, this Court hereby partially grants the States' Motion for Early Discovery.

The Court agrees with counsel for the Government that discovery at this stage of the case may be the exception, not the norm. The facts, as recounted above, certainly establish exceptional circumstances created by the Government that may ultimately require an exceptional remedy. At a minimum, however, Defendants have created special circumstances that necessitate further investigation. The Court finds that good cause exists for the pursuit of tailored discovery.

The Court orders the attorneys for the Government to file, complete with courtesy copies to the Court and Plaintiffs, the following: (i) any and all drafts of the March 3, 2015 Advisory [Doc. No. 176], including all corresponding metadata and all other tangible items

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[11] This Court's ruling that it will not strike the Government's pleadings at this stage does not bar such a sanction in the future should the facts and law warrant that action.

that indicate when each draft of the document was written and/or edited or revised; and (ii) a list of each person who knew about this Advisory, or about the DHS activity discussed therein, and each person who reviewed or approved its wording or filing, as well as the date and time when each person was apprised of this document and/or its contents, or of the DHS activity that is the subject matter thereof. No documents, electronic mails, texts, communications, or tangible items (including without limitation all computer records, hard drives, and servers) of any kind that deal with the Advisory or the subject matters discussed in the Advisory, whether or not owned by the Government, are to be destroyed or erased. While this Court does not foresee any privilege problems impacting the merits of this case, given that a ruling on the merits of the Government's Motion to Stay is being issued simultaneously with this Order, any privileged material shall be filed *in camera* with a privilege log supplied to the Court and opposing counsel.

The Government has until **April 21, 2015**, to comply with this Order. Following their review of the documents produced, the Plaintiff States shall file with the Court a list of any further discovery that they may deem necessary, with a brief summary of why that discovery is relevant. The States have until **May 1, 2015**, to do so. The Government shall have until **May 8, 2015**, to respond to the States' request. The Court will then consider those requests and issue an appropriate order as promptly as its schedule allows.

Signed this 7th day of Apr., 2015.

/s/ ANDREW S. HANEN
ANDREW S. HANEN
United States District Judge

APPENDIX

Chronology of Events

The States' contention that they would have sought a temporary restraining order is quite credible when one views a timeline of the pertinent events in this matter:

1.	*November 20, 2014*	2014 DHS Directive (with the revised DACA, including the new, three-year terms) issued.
2.	*November 24, 2014*	Unbeknownst to the Court (or Plaintiffs), the DHS begins granting three-year DACA extensions pursuant to the revised DACA terms contained in the 2014 DHS Directive's amendments to DACA.
3.	*December 3, 2014*	Original Complaint filed. [Doc. No. 1].
4.	*December 4, 2014*	Motion for Preliminary Injunction filed. [Doc. No. 5].
5.	*December 9, 2014*	First Amended Complaint filed (additional plaintiffs added). [Doc. No. 14].
6.	*December 19, 2014*	Teleconference between Court and attorneys for both sides. (Government attorney tells the Court: "The agency was directed to accept requests . . . by mid-

		February but even after that we wouldn't anticipate any decisions on those for some time thereafter. So there—I really would not expect anything between now and the date [January 9, 2015] of the hearing.") (The hearing was rescheduled at the request of the parties to January 15, 2015.)
7.	*December 24, 2014*	Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction filed. [Doc. No. 38].
8.	*January 7, 2015*	Plaintiffs' Reply in Support of Motion for Preliminary Injunction filed. [Doc. No. 64].
9.	*January 14, 2015*	Motion for Extension of Time to Respond to Plaintiffs' Reply filed by the Government. ("Plaintiffs will not be prejudiced by the two-week extension sought in this Motion, because U.S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the chal-

lenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015.") [Doc. No. 90].

10. *January 15, 2015* — Hearing on the preliminary injunction. Counsel for the Government stated, in pertinent part, the following:

(a) "[N]o applications for the revised DACA—this is not even DAPA—revised DACA would be accepted until the 18th of February and that no action would be taken on any of those applications until March the 4th."

(b) In response to a question by the Court about whether any activity was going to happen on either revised DACA or DAPA in the next three weeks, Counsel for the Government stated: "No, Your Honor . . . In terms of accepting applications or granting any up or down ap-

plications . . . For revised DACA, just to be totally clear."

11. *February 16, 2015* — Court issued Order of Temporary Injunction and Memorandum Opinion and Order. [Doc. Nos. 144 & 145].

12. *February 23, 2015* — Government's Notice of Appeal to the Fifth Circuit filed. [Doc. No. 149].

13. *February 23, 2015* — Government's Motion to Stay Injunction (requesting an expedited ruling from this Court by February 25, 2015) filed. [Doc. No. 150].

14. *February 23, 2015* — States' Advisory (requesting time to respond to Government's Motion to Stay Injunction) filed. [Doc. No. 151].

15. *February 24, 2015* — Court ordered States to respond to Motion to Stay by specified deadline. [Doc. No. 156].

16. *February 27, 2015* — Sheriff Joe Arpaio's (*amicus curiae*) Motion to Show Cause filed. [Doc. No. 160]. (This Motion was subsequently denied by the Court.)

17. *March 3, 2015 (4:46 p.m. CST)*	States' Response in Opposition to Government's Motion to Stay filed. [Doc. No. 175].
18. *March 3, 2015 (6:57 p.m. CST)*	Government's Advisory (revealing that over 100,000 three-year extensions had been granted pursuant to DACA revisions contained in the 2014 DHS Directive) filed. [Doc. No. 176].
19. *March 4, 2015*	Government's (Procedural) Advisory (noting that it will not respond to the States' Response, and requesting an expedited ruling by March 9, 2015) filed. [Doc. No. 180].
20. *March 5, 2015*	States' Opposed Motion for Early Discovery filed. [Doc. No. 183].
21. *March 6, 2015*	States' Supplement to Motion for Discovery filed. [Doc. No. 188].
22. *March 9, 2015*	Court ordered hearing on States' Motion for Discovery and Government's March 3, 2015 Advisory.
23. *March 19, 2015*	Hearing held on pending motions.

24.	*March 21, 2015*	Government's Response in Opposition to States' Motion for Discovery filed. [Doc. No. 207].
25.	*March 23, 2015*	States' Reply in Support of Motion for Discovery filed. [Doc. No. 209].

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: May 7, 2015

DEFENDANTS' MAY 7 ADVISORY

Defendants file this Advisory to apprise the Court of information that came to the attention of Department of Justice counsel yesterday, May 6, 2015, concerning the Department of Homeland Security's ("DHS") compliance with the Court's February 16, 2015 preliminary injunction. Specifically, and as described further below, United States Citizen and Immigration Services ("USCIS"), while preparing notifications to a small number of individuals who had erroneously been given three-year terms of work authorization after the issuance of the injunction, discovered that another group of approximately 2000 individuals had been erroneously sent three-year work authorizations after the Court had issued its injunction. The

Government sincerely regrets these circumstances and is taking immediate steps to remedy these erroneous three-year terms.

Defendants previously advised the Court that, after entry of the preliminary injunction, USCIS ceased according three-year terms of deferred action, as well as three-year Employment Authorization Documents ("EADs"), to individuals who had requested deferred action under the 2012 DACA eligibility criteria, with the exception of approximately 55 individuals who erroneously received three-year EADs issued after the injunction was entered. *See* Defs.' Mar. 3 Advisory, ECF No. 176, at 2; Defs.' Supp. to Stay Mot., ECF No. 195, at 3; Mar. 19, 2015 Tr. at 35; Defs.' Resp. to Court's Order of April 7, 2015 at 16 n.19, 18 n.12.[1]

Defendants also previously advised the Court that there were a number of applicants who had requested deferred action under the 2012 DACA guidelines and had been approved prior to the February 16, 2015 preliminary injunction, but who had not yet been issued EADs at the time of the injunction. DHS believed, and, through counsel, reported to the Court, that those pending cases were put on hold as of the time of the injunction to prevent documentation associated with three-year terms from being sent. See Mar. 19 Tr. at 35 (discussing "about 750" cases "in the pipeline" for

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[1] DHS believes that the number of applicants whose requests have been adjudicated and have received three-year terms and EADs post-injunction is now 72, due to additional errors that occurred after the 55 previously reported to the Court.

2012 DACA on the day the injunction was issued); *see also* Mar. 3 Advisory at 2 & n.1. DHS now believes that approximately 2000 individuals (in addition to the much smaller number of individuals approved for three-year deferred action post-injunction, as discussed above), all of whom were eligible under the 2012 DACA eligibility guidelines, actually received three-year EADs after the injunction issued. DHS is already in the process of converting these three-year terms into two-year terms. The Secretary of Homeland Security also has asked the DHS Inspector General to investigate the issuance of these three-year EADs.

The Government sincerely regrets these circumstances and is taking prompt corrective steps, while gathering additional information about these issues, including how these errors occurred. The Government will supplement this Advisory with additional details as soon as they are available, and by no later than May 15, 2015.

To the extent Plaintiffs believe additional time is necessary to respond to the Court's Order of April 7, 2015, in light of this information and the current May 11, 2015 due date for their submission, Defendants would consent to granting Plaintiffs such relief.

Date: May 7, 2015 Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 1:14-cv-254

STATE OF TEXAS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: July 9, 2015

DEFENDANTS' JULY 9 ADVISORY

The Government takes very seriously the concerns expressed in the Court's July 7, 2015 Order. The Government fully appreciates the urgency of the situation and is proceeding with expedited remediation. On July 31, 2015, the parties will file a joint status report in which the Government will detail the actions it has taken to correct the problems identified in the May 7 Advisory and the results of those actions, including steps taken since the June 23, 2015 hearing. *See* Order of July 7, 2015 (ECF No. 281); Minute Entry of June 23, 2015. The Government files this Advisory to apprise the Court of (1) new information with respect to three-year Employment Authorization Documents (EADs), and (2) the ongoing measures to ad-

dress the matters raised in the Court's July 7, 2015 Order.

The Government recognizes the import of the Court's concerns regarding the progress of the Government's efforts relating to the approximately 2,000 post-injunction issuances. In addition to other measures that are underway, the three-year DACA grants and EAD cards have been invalidated for all of these individuals and changed to two years; the SAVE database that states use to verify eligibility for driver's licenses and other state benefits has been updated to reflect the two-year authorizations for all of these individuals; and USCIS has now sent two rounds of individualized letters demanding the return of the three-year EAD cards and warning recipients that a failure to return the card could affect their deferred action and employment authorization. The Government has already secured return of nearly 1200 of these three-year EADs. We are now executing additional steps to secure return of the remaining three-year EADs. The Government will provide the Plaintiffs with further updated information as part of the meet and confer process.

Finally, as part of its ongoing efforts to keep the Court promptly apprised of developments, Defendants file this Advisory to inform the Court of information that recently came to the attention of counsel for the Government regarding a relatively small number of three-year EADs that were approved and issued by the Department of Homeland Security (DHS) prior to the Court's entry of its preliminary injunction, were

mailed to the intended recipients prior to the injunction, returned by the Postal Service as undeliverable, but which were then re-mailed after the Court's injunction. Defendants will also update the Court on this issue as part of the July 31, 2015 status report.

According to DHS's currently available information, a small percentage of three-year EADs approved, issued, and mailed prior to the injunction—approximately 500 of the EADs approved and issued—were then returned as undeliverable and subsequently re-mailed to an updated address after the Court's entry of its injunction. These were EADs provided to individuals who qualified for 2012 DACA. Government counsel has been advised that these cards were re-mailed pursuant to standard USCIS mail processing procedures by a mailing contractor. Defendants are continuing to examine the circumstances leading to the re-mailings, but are filing this Advisory now to ensure that the Court is promptly apprised of this information. DHS is taking immediate steps to address the issue. DHS is undertaking an expedited process of corrective action for the approximately 500 three-year EADs re-mailed after the injunction. All such three-year EADs will be converted to two-year EADs, and DHS will expeditiously seek the return of the three-year EADs that were re-mailed—as it is doing for the approximately 2,000 individuals addressed in the Government's May 7, 2015 advisory.[1]

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[1] In addition, DHS is taking steps to ensure that no additional three-year EADs will be re-mailed in the future. For those three-

Defendants will update the Court on the above-described actions relating to the re-mailing issue, as well as the actions taken with respect to the approximately 2,000 individuals who were the subject of the Government's May 7, 2015 Advisory, as part of the July 31 status report, which we believe will satisfy this Court that no hearing is required on August 19.

Date: July 9, 2015 Respectfully submitted,

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United States Attorney

DANIEL DAVID HU
Assistant United States Attorney
Deputy Chief, Civil Division

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JOYCE R. BRANDA
Deputy Assistant Attorney General K

ATHLEEN R. HARTNETT
Deputy Assistant Attorney General

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year EADs that have been returned but not yet re-mailed to an updated address, they will be converted to two-year EADs prior to any re-mailing. And if additional three-year EADs are returned, DHS has created a process to capture them in order to ensure they are converted to two-year EADs prior to any re-mailing. DHS believes it is unlikely that there will be many, if any, three-year EADs that will be returned as undeliverable at this point in time given the time that has now passed since the injunction issued.

JENNIFER D. RICKETTS
Branch Director, Federal Programs Branch
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[SEAL OMITTED]

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

Feb. 25, 2015

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley:

At the February 3, 2015 hearing on the budget and IRS operations, you asked if we intend to revisit the 2000 Chief Counsel advice (CCA) in light of the President's executive action on immigration.

At your request, we have reviewed the relevant statutes and legislative history, and we believe that the 2000 CCA is correct. The CCA concludes that a taxpayer may claim the earned income tax credit (EITC) for a taxable year using a social security number (SSN) acquired in a later taxable year (subject to refund limitations under section 6511 of the Internal Revenue Code). Section 32 of the Internal Revenue Code requires an SSN on the return, but a taxpayer claiming the EITC is not required to have an SSN before the close of the year for which the EITC is claimed.

I hope this information is helpful. If you have any questions, please contact me, or a member of your staff can contact Leonard Oursler, Director, Legislative Affairs, at (202) 317-6985.

Sincerely,

/s/ JOHN A. KOSKINEN
JOHN A. KOSKINEN

Office of Senator Charles Grassley
Senators Introduce Bill Disallowing Tax Credit Under 2014 Executive Actions

Mar 10, 2015

WASHINGTON – Sens. Chuck Grassley of Iowa, Mike Enzi of Wyoming, Mike Crapo of Idaho, Jim Inhofe of Oklahoma, David Perdue of Georgia, Tim Scott of South Carolina, Pat Roberts of Kansas, Johnny Isakson of Georgia, Jim Risch of Idaho, John Boozman of Arkansas and John Cornyn of Texas today introduced legislation to disallow the Earned Income Tax Credit for those made newly eligible for past benefits under the President's executive actions on immigration.

"This tax credit is meant to help the working poor get into the workforce," Grassley said. "It isn't meant to benefit individuals who aren't authorized to work in the United States. Congress implemented that policy in 1996. The legislation introduced today upholds the principle that many of us in Congress support. The tax code shouldn't reward those who broke our immigration laws."

"Congress should always be looking to protect the tax dollars of hard working Americans. This legislation would ensure that those individuals who were not here legally cannot use their new status to claim tax credits that they were not entitled to," said Enzi.

"Unfairly rewarding individuals who entered the country illegally with retroactive tax benefits undermines our immigration system and discourages those who seek to come to America from doing so through

the proper legal channels," said Crapo. "This legislation will prohibit the Administration from manipulating the Earned Income Tax Credit as a way to further advance its unilateral immigration policy agenda."

"President Obama's illegal executive amnesty has many negative consequences, and this tax loophole is one of them," said Perdue. "I urge my Senate colleagues to stop the President's unconstitutional actions, and preventing these benefits from going to those who broke our immigration laws and were granted amnesty is an important step."

"To reward individuals who are in this country illegally, and to do so with hardworking taxpayers' dollars, is incomprehensible and unacceptable," said Isakson, a member of the Senate Committee on Finance with jurisdiction over tax policy and the Internal Revenue Service (IRS). "Yet millions of individuals benefiting from the president's unconstitutional executive amnesty could become eligible to claim a tax credit based on a questionable interpretation of tax rules by the IRS. I will continue to do all that I can to stop this executive immigration overreach and will fight to prevent the IRS from doling out hundreds of millions of taxpayer dollars to those who broke our immigration laws."

"This bill will benefit the millions of hardworking Americans who pay their fair share of taxes, which contribute to our roads, schools, and the safety of this country," said Risch. "Providing tax credits to people who are living in our country and enjoying those benefits without paying taxes isn't right or fair. We can-

not reward people who come to our country by breaking the law."

"The IRS seems inclined to allow individuals benefitting from the President's unconstitutional and unilateral actions on immigration to claim billions of dollars in tax benefits for unauthorized work. This bill closes a loophole that allows illegal immigrants to take advantage of the system and claim a refund financed by hardworking Americans," Boozman said.

The bill denies the Earned Income Tax Credit to individuals granted deferred action under the 2014 executive actions, and any similar actions going forward, for any period in which they performed work illegally in the United States. This bill is intended to close a loophole created by a 2000 IRS interpretation that has the effect of allowing those receiving deferred action to qualify for a credit they were previously denied or otherwise ineligible for at the time. It is consistent with policy put in place in 1996 intended to deny the credit to those not authorized to work in the United States.

This legislation would accomplish this by denying the credit to those receiving deferred action unless they were eligible to claim the credit for the year in question and were authorized to engage in employment in the United States for the entire taxable year. This rule would apply to the year in which they are granted deferred action and for all previous returns. To help the IRS administer this rule, information sharing requirements between the Department of Homeland

Security, the Social Security Administration and the IRS are established.

The non-partisan Joint Committee on Taxation has estimated that this proposal will save $1.7 billion over ten years in payments that otherwise would have gone out. The actual amount of Earned Income Tax Credit payments going to those receiving deferred action could be much greater than $1.7 billion over 10 years, however. The score is based on the premise that it will take a year for the IRS to update its systems to account for this change.

[SEAL OMITTED]

Social Security Administration
Social Security Number and Card —
Deferred Action For Childhood Arrivals

Am I eligible for a Social Security number and card?

If the U.S. Citizenship and Immigration Services (USCIS) approves your request for Deferred Action for Childhood Arrivals and your application to work in the United States, you may be eligible for a Social Security number. After you get your (I-766) Employment Authorization Card, you can apply for a Social Security number.

How do I apply for a Social Security number?

Social Security must interview you in person so you can complete and sign your application. Call your local office, which you can find online at ***www.socialsecurity.gov/locator***. You must bring papers proving you have permission to work in the United States, your immigration status, age and identity.

You Must Show Social Security

You must show us the originals or certified copies of two documents:

1. Form I-766 Employment Authorization Card (EAD, work permit), and
2. Your foreign birth certificate (if you have one or can get one within 10 business days). If you cannot, we may accept your:
    - Foreign passport;

- U.S. military record; or
- Religious record showing age or date of birth.

If you do not have or cannot get one of the above preferred papers within 10 business days, we may accept your:

- U.S. driver's license;
- U.S. state-issued identification card; or
- School record (issued five or more years ago) showing age or date of birth.

Please note: While you may have shown USCIS photocopies of the above papers, you must bring Social Security originals or copies certified the agency that issued them. **We cannot accept photocopies or notarized copies.** We must independently verify the documentation you show us.

For more information, visit **www.socialsecurity.gov** or call toll-free, **1-800-772-1213** (for the deaf or hard of hearing, call our TTY number, **1-800-325-0778**).

www.socialsecurity.gov **1-800-772-1213**
1-800-325-0778 (TTY)

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES OVERSIGHT

114th Cong.
Tuesday, Mar. 3, 2015
2:30 p.m.

ENSURING AGENCY PRIORITIES COMPLY WITH THE LAW: HEARING BEFORE THE SUBCOMMISSION ON IMMIGRATION AND THE NATIONAL INTEREST OF THE SENATE COMMITTEE ON THE JUDICIARY

Participants: Senator Jeff Sessions (R-AL)
Witnesses: Joseph Moore, CFO of U.S. Citizenship and Immigration Services; Donald Neufeld, associate director of U.S. Citizenship and Immigration Services' Service Center Operations Directorate; and Dan Renaud, associate director of the U.S. Citizenship and Immigration Services' Fraud Operations Directorate

* * * * *

CRUZ: Thank you very much. I want to shift topics to the question of fees and a couple of different aspects of it. Number one, Mr. Moore as I understand that USCIS's position is that various immigration fees can be allocated. Let's set aside the District Court Junction for a moment, but prior to the injunction, it was USCIS's position that that certain fees could be allo-

cated to implement DACA and DAPA. Absent Congressional authorization and there are a variety of fees, including the Immigration Examination Fee account, the Immigration User Fee Account, the H-1B non-immigrant petitioner account, the land border inspection fee account, the Fraud Prevention and Detection Account, the premium processing fees and all of these are enumerated entitled Aid of the United States Code Section 1356. The first question I'd ask of you Mr. Moore is, roughly how much money does USCIS have at its disposal. Via the Immigration Examinations Fee Account and these other accounts and fees.

MOORE: Thank you for the question. Managing a fee-based operation the size of USCIS is complex with many different fees. We have set as a condition of protection for us to retain at least $600 million annually is our cash reserves. The one thing that we recognize is that USCIS in many ways operates very much like a commercial enterprise. We get money as it comes in and we have to manage our expenses related to that at the beginning of a year when we're anticipating spending up to $3 billion and much of that is what we call anticipated collection. So, as we're spending—we're taking a new fee revenue. Our permanent and definite appropriation allows us the authority to immediately access those fee revenues. We still do work with treasury to get money warranted and with OMB to have a portion to us but all of that is happens quite seamlessly in the Immigration Examinations Fee Account. So, we have a very detailed operating plan that we used to identify our agency spending. And so, that operating plan ensures that

were maintaining that reserve. And I wanted just mention to the fee as I've mention on my opening statement is subject to fluctuations normal course of business. And the fee structure allows for those searches and workload to bring in fee revenue that allows us to promptly address . . .

(CROSSTALK)

CRUZ: How much money are we talking about?

MOORE: In our reserves? So, as I said, we had last year in total, and our Examinations Fee Account about $1 billion carry over balance and that was between premium processing about $734 million then balance of, or, excuse me, non-premium processing $734,000 and about $460 million in non-premium.

CRUZ: Now you stated in a letter to the chairman that those funds can be used for the purpose of processing DACA and DAPA. Do you see any statutory language, whatsoever, entitle A United States Code, Section 1356 that allows those funds to be used for those purposes?

MOORE: So, Senator, thank you for that question. I defer to our legal counsel to guide us on the lawfulness or the appropriateness of programs and initiatives as far as expanding our Immigration Examinations Fee Account, and so, I rely on that.

CRUZ: But you can't point any statutory language here today. Is that correct?

MOORE: I'm not qualified to make that kind of determination. Again, I work with our legal counsel

that gives me advice and assures us that in their view, it's legal. So, if I am moving forward with authorizing spending within our agency I'm doing so with the confidence that it's legal action based on council that I'm receiving.

CRUZ: I would note your legal counsel is apparently authorizing you to spend money that is not authorized by statute. I would also note the position of USCIS that there is over a billion dollars in unregulated funds that is not subject to Congresses' authority and can be spent independent of the appropriations process is something it seems to me, Congress should correct in this upcoming appropriation cycle, so that USCIS operates like any other agency of this government pursuant to appropriated funds and not with your own bank account. Let me shift to a different topic with the chairman's indulgence.

One of my many concerns with the president's executive amnesty. My first concern is that it is contrary to federal law and unconstitutional. And as I noted earlier, a federal district court has agreed that it is contrary to law and is accordingly enjoined it. For another major concern is a question of fairness that executive amnesty benefits and, in fact, gives preferences to those who are here illegally and it does so to the detriment of legal immigrants of those who have followed the law and come here legally. I am the son of illegal immigrant, 58 years ago, came here, applied to come here legally and ultimately received US citizenship. It was reported the Los Angeles Times that the DAPA program was expected to cost between $324

million and $484 million over the next three years. Is that an accurate projection?

MOORE: Yes, sir. That is based on internal cost estimates.

CRUZ: And that means somewhere between $324 million and $484 million that would otherwise be spent to aid the processing of legal immigrants is not being spent for legal immigrants. And so, their wait times are going up, the preoccupancy is going up, their burdens are going up. Is that accurate?

MOORE: Senator, not quite the fee associated with a DACA expansion DAPA applicant, $380 for the employment authorization document, $85 for the biometrics was part of the filing requirement and we estimated that through those requests with the associated fee that would yield the kind of revenue that you quoted, so that we believe that individuals of applying for deferred action would, in fact, paid that the cost of the program without us having to borrow from others.

CRUZ: Well, I'm glad you brought that up because you describe the $380 I75 fee and the $85 biometric fee is somehow a fee for DACA and DAPA, but is it correct that those apply to everyone, not specially DACA or DAPA.

MOORE: Those are the fees that are associated with the DACA original.

CRUZ: But they're not specifically DACA and DAPA, are they? Are there non DAPA or DACA applicants who pay those fees?

MOORE: No, sir. Not in the combination of—well, when I—let me rephrase that. We package the form I8-21D in the I7-65 together as a filing requirement. Only DACA DAPA applicants are filing those documents as a package.

CRUZ: So the I7-65 is not paid by anyone who is not a DACA or DAPA recipient?

MOORE: No. The work authorizations are issued according to other adjudicative actions that they would pay that fee. Correct.

CRUZ: So, it goes back to what I said, everyone's paying that fee. That's not a special DACA DAPA and let me just underscore this, so, for example, the I-140, the Immigrant Petition for Alien Worker is $580. That someone coming here legally to work. A DACA or DAPA person pays zero dollars. Now they both pay the $360 and the $85. But in terms of the fee for the application someone following the law is penalized and is paying in that instance, $585 versus zero dollars. Is that correct?

MOORE: Senator, I think the—the DAPA and DACA applicants we are charging $365 or $380 to cover the cost of processing their request. The individuals filing the I140 or applying for a separate benefit and they are paying an associated fee for that. So, there isn't an overlap.

CRUZ: All right. Let's give another example which is the I5 . . .

(CROSSTALK)

SESSIONS: It's the same amount of money, right?

MOORE: The same fee, I765 fee, is correct. That's the same fee across the board.

CRUZ: The I526, the Immigrant Petition by Alien Entrepreneur cost $1500. So, someone wants to come here start a business, create jobs, we say, thank you very much you write a check for $1500. Someone who came here illegally broke our laws and is applying for DAPA or DACA we charge them zero dollars. Is that correct?

MOORE: We, Senator, we calculate our fees based upon the level of effort is required to review and process each form type. We use activity-based costing to do so. So, if the cost is much higher for that . . .

(CROSSTALK)

CRUZ: Let's get one more example, which is the I924. The application for regional center under the immigrant investor pilot program. The immigrant investor putting capital to work to create jobs at a time, and when the lowest labor force participation since 1978. We charge that person $6230 for the privilege of hiring Americans and creating jobs. Those who come here legally are being penalized and yet those who come here illegally are facing a fee of zero dollars to be allowed legal status. Does that strike anyone on this panel as remotely fair?

MOORE: Senator, we do charge a fee for the DACA and DAPA program. It's not free. There is the . . .

CRUZ: The $330 dollars and the $85 paid uniformly by everyone. So, that's not a special fee for DACA and DAPA.

MOORE: No, but it is the fee that they're paying. It's not . . .

(CROSSTALK)

CRUZ: So, they're paying one of the fees, but everyone else coming legally pays an additional fee except those here illegally. I have to say I cannot think of any other fee program, any rational fee program that allows those who break the law to be exempt from paying a fee. But if someone is foolish enough to actually try to comply with our immigration laws to wait at home to wait in line for years, sometimes decades, we smacked them with a fee of $1500 or $6200, but those who are here illegally pay nothing. That strikes me as a program that is indefensible to the American people. Thank you, Mr. Chairman.

SESSIONS: Thank you. Aiming the game of eight bill had a $1000 fine or penalty before they can apply in addition to the same fees. Senator Cornyn.

CORNYN: Thank you, Mr. Chairman. As an advocate for legal immigration and also the rule of law those are not inconsistent, I might add. It's a real shame order today to investigative the departments attempt to circumvent our nation's immigration laws. If we are going to fix our broken immigration system,

we first have to regain the trust of the American people. And that's a casualty. I believe of what we've seen the last year. So, they must believe that the federal governments actually doing its job to secure the border.

They must trust our immigration laws will be fully enforced and that dangerous criminal aliens will not be released from detention. And they must trust that we will have an immigration system that is fair and respectful to the millions of legal immigrants who wish to enter the United States to pursue the American dream. And again, it bears noting we are the most generous country in the world when it comes to legal immigration. Sadly, the Obama administration has violated this trust by attempting to unconstitutionally grant legal status and work authorization to millions of illegal immigrants in the United States without any engagement by with the Congress.

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the WHITE HOUSE PRESIDENT BARACK OBAMA

Office of the Press Secretary

For Immediate Release Feb. 25, 2015

Remarks by the President in Immigration Town Hall—Miami, FL

Florida International University
Miami, Florida

4:00 P.M. EST

MR. DIAZ-BALART: Ladies and gentlemen, the President of the United States. (Applause.)

It's good to see you, Mr. President.

THE PRESIDENT: It's good to be with you, José.

MR. DIAZ-BALART: Thanks for being here at FIU. Really appreciate you being here with us.

THE PRESIDENT: It is wonderful to be with the Golden Panthers. (Applause.)

MR. DIAZ-BALART: There you go!

Mr. President, let's begin. It's going to be bilingual at times, but you and I are used to that.

THE PRESIDENT: I can handle that.

MR. DIAZ-BALART: Senator McConnell, on Tuesday, made an offer to break the Department of Homeland Security impasse. He wants to vote to fund DHS through September and then separately vote to strip funding for your executive actions on immigration.

As you know, it seems as if the Democrats are onboard in the Senate. We're 48 hours from the deadline. Republicans have a plan. Democrats seem to be onboard. You're waiting on a judge. Is that enough?

THE PRESIDENT: Well, José, let me start by just talking generally about why immigration is so important and why we've got to fix a broken system.

We've had a system for a very long time that nobody is happy with. We know that businesses are being deprived of outstanding workers. We know that our agricultural sector that's so dependent on immigrants is hurting because of uncertainty. We know that we should be deploying our resources and focusing it more on dealing with felons and national security issues with respect to our borders, and not focusing on the mom who's working someplace, looking after her kids and doing the right thing.

And for over six years, now, I've been calling on the Republicans to work with us to pass a comprehensive fix that would strengthen our borders, that would make sure that businesses have the workforce that they needed, aboveboard, not paying them under the table, not depriving them of things like overtime or workers' rights, and that we provided a pathway for people to earn their way into a legal status and ultimately citizenship.

And to their credit, members of the Senate passed a bipartisan bill, overwhelmingly. But the House Republicans blocked it. They refused to even allow it to

get on the floor for a vote. What I did, then, was to say I'm going to use all of the authority that I have as the chief executive of the United States, as well as Commander-in-Chief, to try to make sure that we are prioritizing our immigration system a lot smarter than we've been doing. And what that means is, is that instead of focusing on families, we're going to focus on felons. We're going to strengthen our borders, which is what people are concerned about.

We're going to build on what we did in 2012 with DACA, which allowed young people who had come here and were Americans in all respects except they didn't have the proper papers to get legal so that they could continue in their higher education, they're serving in the military—

MR. DIAZ-BALART: They know no other country.

THE PRESIDENT: They know no other country. And this approach of executive actions has been used by previous Republican and Democratic Presidents throughout modern times.

Now, what we did most recently was to expand that so more people would qualify for DACA, and we also said if you are the parent of a U.S. citizen or a legal resident, if you've been here for a while, if you're part of our community, then you should be able to come forward, get registered, go through a background check, and if you generally have been contributing to our community, you should be able to stay here legally and not be in fear of deportation.

It did not provide citizenship because only Congress can do that, but it was going to help. And I think we saw the reaction in the community and, the truth is, across the country, people recognized this was the right thing and the smart thing to do.

Now, unfortunately, a number of Republican governors chose to sue. They found a district court judge who has enjoined—meaning stopped—us going forward with this program. But that's just the first part of the process. This is just one federal judge. We have appealed it very aggressively. We're going to be as aggressive as we can because not only do we know that the law is on our side, but history is also on our side.

And in the meantime, what we said to Republicans is, instead of trying to hold hostage funding for the Department of Homeland Security, which is so important for our national security, fund that, and let's get on with actually passing comprehensive immigration reform.

So in the short term, if Mr. McConnell, the leader of the Senate, and the Speaker of the House, John Boehner, want to have a vote on whether what I'm doing is legal or not, they can have that vote. I will veto that vote, because I'm absolutely confident that what we're doing is the right thing to do. (Applause.) And in the meantime, we're going to continue to pursue all legal avenues to make sure that we have a country in which we are respecting not only the law, because we're a nation of laws, but we're also respecting the fact that we're a nation of immigrants.

And I'm confident that, ultimately, people who have been living here for a long time, who have roots here, oftentimes have U.S. citizen children here or legal resident children here, that they deserve to have an opportunity. And that's what we want to provide them.

Q (As interpreted.) Mr. President, independently of what can happen with all the appeals and judges, it would take months. Mr. President, we're facing very real consequences and our community is in fear—has fear that's due to your actions, because that fear is that uncertainty. Millions of people are in the balance here against a rock and a hard place. What is the responsibility you feel regarding this uncertainty, this pain that a lot of the community, the Hispanic community are feeling?

THE PRESIDENT: Well, one of the most important things that I think everybody needs to know—and this didn't get enough attention when I made my announcement last year—in addition to expanding DACA, in addition to creating the DAPA program for the parents of DREAMers, what we also did was we said we're going to change how ICE and our Border Patrol system operates. Because we recognize we're not going to deport 11 million people. And so why we would want to allocate resources in a wasteful way—that doesn't make sense.

What we said was let's prioritize who it is that we're really focused on. We're focused on criminals and gang members who are a threat to our community. And we're focused on the border and making sure the

people who've just come, that we are making sure that they are in a position where they understand that they've got to come through legal pathways. But for people who've been living here for a long time, they are no longer prioritized for enforcement and deportation.

And so, even as people should be preparing their paperwork so that when the time comes that they can apply. in the meantime, understand that ICE and the border security mechanisms that we have in place, they are instructed to focus on criminals and people who have just crossed the border. If you've been here for a long time and if you qualify, generally, then during this period, even with legal uncertainty, they should be in a good place.

MR. DIAZ-BALART: And the problem is, Mr. President, that that may be the fact, but where the rubber meets the road, that's not happening many times. Many times, people are being deported that have been here, that have kids, that have a process to even become legal, and they're being deported. So one thing is what you're saying; another thing, a lot of times, is what happens where the rubber meets the road.

THE PRESIDENT: I think what you're going to be finding, José, is that every time that you have a big bureaucracy and you've changed policy, there's going to be one or two, three instances where people apparently haven't gotten the message. But if you talk to the head of the Department of Homeland Security, Jeh Johnson, he is absolutely committed to this new prioritization. More importantly, I, the President of the

United States, am absolutely committed to this new prioritization.

And so families out there need to understand that we are going to be focusing on criminals. We're going to be focusing on potential felons. We are reorganizing how we work with state and local governments to make sure that we are not prioritizing families. And you are going to see I think a substantial change, even as the case works its way through the courts.

MR. DIAZ-BALART: Mr. President, I want to go to the audience. Eric is a war veteran. He was wounded in Afghanistan. He is with us this afternoon.

Eric.

Q Good afternoon, Mr. President.

THE PRESIDENT: Hey, Eric.

Q First and foremost, I want to thank you for coming here. There's so many things going on in the world right now, and I just want to thank you for taking your time to come and talk to us, because I know you have to deal with so many things. I can only imagine what you have to deal with every day.

But a little bit about myself. When I was 17, I joined the U.S. Army. Actually, my mom had to sign because I was so young. My 18th birthday I spent in basic training, and my 21st birthday was spent in Afghanistan, and I was actually shot at on my birthday. I came back. I'm a wounded warrior. I was medically discharged from the military in 2011. And I

come back home, and only to find out that I'm fighting another war with my mother—trying to keep her here.

So I just want to ask you, Mr. President, there has to be some kind of gray area for a situation like this. Because I put in a lot of time and I love this country, and I just feel like if it wasn't for her signing those papers I would never have been able to join this great American army. So I want to ask you if there's any way that situation could be handled a little better.

THE PRESIDENT: Well, first of all, let me just say thank you for your incredible service to our country. (Applause.) You're a great example of why this issue is so important. Our country is strong because of generation after generation of immigrants who embraced the ideals of America and then fought for those ideals, and fought in wars to defend our country, and built companies that employed people, and helped to build the railroads and the highways. And all the things that we take for granted in this country, those were built by immigrants. We're all immigrants. That's who we are. Unless you're one of the first Americans—Native Americans. And so we have to recognize that.

And I'm confident that your mother qualifies under the executive action program that I've put forward. Right now, the judge has blocked us initiating the program where she can come and sign up and get registered. But in the meantime, part of the message that I'm sending is, if you qualified for the executive action that I put forward, then we're still going to make sure that your mom is not prioritized in terms of enforce-

ment. And she should feel confident about that. So I just want to assure her, short term.

Long term, we need a situation where she has a pathway to become a legal citizen. And that's why we still have to make sure that we get a bill passed through Congress, and we have to keep the pressure on those who are blocking that bill.

One last point that I think is important. The judge in this case did not reverse DACA that I put forward in 2012. So hundreds of thousands of young people all across the country who've signed up, registered, and are going to school, making something of their lives—you have to understand that hasn't been affected whatsoever.

MR. DIAZ-BALART: Expand on that a little bit, because it's important.

THE PRESIDENT: It's important that in 2012, when I made my first announcement about executive actions, that applied to the DREAMers. Basically, if you were—if you had come here before 2007, you're between the ages of 16 and 30, you could register, sign up, you now had a legal status. It was temporary because we hadn't passed a bill yet, but it meant that you could get a work permit, you could go to school—you could do the things that American kids do as they're entering into adulthood.

That has not changed. And so those who've already signed up, you need to understand that has not been challenged in court. And what's also important is we still have several hundred thousand young people who

qualify for that original executive action back in 2012 who have not yet taken advantage of it. And now is the time for all of you to take advantage of it.

MR. DIAZ-BALART: Eric, thank you for that question. (Applause.) And, Mr. President, we've been just flooded with questions using our social media hashtags, and this one comes from #ObamaResponde. It says: How do you guarantee that an immigrant who is in the middle of legalizing his status that eh or she is not going to be deported by ICE? Mr. President, my husband was deported during the process, and this, she says, happened just last week.

THE PRESIDENT: I would have to know the details of what exactly happened. But what I can tell you is that until we pass a law through Congress, the executive actions that we've taken are not going to be permanent; they're temporary.

We are now implementing a new prioritization. There are going to be some jurisdictions, and there may be individual ICE officials or Border Patrol who aren't paying attention to our new directives. But they're going to be answerable to the head of the Department of Homeland Security, because he's been very clear about what our priorities should be. And I've been very clear about what our priorities should be.

And I don't know what the particular circumstances here are, but what I can tell you is people who have signed up, for example, under my executive action in DACA—there are 700,000, 800,000 people who signed

up—they haven't had problems. It's worked. So we know how to make this work.

Right now we've got to judge who's blocking it from working.

And in the interim, until we can actually process all these applications, then what we're going to do is do what we can in terms of making sure that we're prioritizing it properly. But the challenge is still going to be that not only do we have to win this legal fight, which we are appealing very aggressively, but ultimately we're still going to have to pass a law through Congress.

The bottom line is, José, that I'm using all of the legal power vested in me in order to solve this problem. And one of the things about living in a democracy is that we have separation of powers we—have Congress, we have the judicial branch—and right now, we've got some disagreements with some members of Congress and some members of the judiciary in terms of what should be done.

But what I'm confident about is, ultimately, this is going to get done. And the reason it's going to get done is it's the right thing to do and it is who we are as a people. (Applause.)

MR. DIAZ-BALART: But what are the consequences? Because how do you ensure that ICE agents or Border Patrol won't be deporting people like this? I mean, what are the consequences?

THE PRESIDENT: José, look, the bottom line is, is that if somebody is working for ICE and there is a

policy and they don't follow the policy, there are going to be consequences to it. So I can't speak to a specific problem. What I can talk about is what's true in the government, generally.

In the U.S. military, when you get an order, you're expected to follow it. It doesn't mean that everybody follows the order. If they don't, they've got a problem. And the same is going to be true with respect to the policies that we're putting forward.

MR. DIAZ-BALART: Mr. President, people in your own administration, legal experts, predicted for weeks really that the Texas judge could probably rule against you. And this could happen again. I mean, you just mentioned there are more than 25 people who have joined in states, who have joined in this legal process. Any and all of these other cases or judges could also act the same way that this judge in Texas did. So what was the contingency plan? I mean, did you have a contingency plan? I mean, did you have a contingency plan? Specifically, what are you going to do going forward as this process continues?

THE PRESIDENT: Well, José, we've got one judge who made this decision. We appeal it to a higher court. We believe that the law is clearly on our side. This is true in everything that we do.

Look at the Affordable Care Act. We've signed up 11 million people to get coverage through the Affordable Care Act. Over 2.5 million of them are Latino. (Applause.) Because of what we've done, we've seen the

percentage of uninsured Latinos drop by almost 7 percent. It's unprecedented. So we know it can work.

Now, that hasn't stopped the Republican Party from suing us constantly, to try to find a judge who may think that what we're doing is in appropriate, despite the fact that it passed through Congress. We've got a Supreme Court that is still ruling on these cases. But that hasn't stopped us from moving forward.

And that's been true historically on every movement of social progress. It's not always a straight line. Sometimes we're going to get legal challenges, but as long as we're confident—and I am very confident in this circumstance that this is within my power—that ultimately then it's going to get done.

But the one thing I do want to emphasize is that in order for us to get absolute certainty that it's going to be permanent and not just temporary, that it doesn't just last during my administration and then get reversed by the next President, is we've got to pass a bill —which means the pressure has to continue to stay on Congress.—(Applause.) The pressure has to continue to stay on the Republican Party that is currently blocking the passage of comprehensive immigration reform.

It means that for the next set of presidential candidates—because I'm term-limited; Michelle is happy about that—(laughter)—when they start asking for votes, the first question should be, do you really intend to deport 11 million people? And if not, what is your plan to make sure that they have the ability to have a

legal status, stay with their families, and ultimately contribute to the United States of America?

So we're going to have to keep on with the political process on a separate track. But in the meantime, we're going to do everything that we can to make sure that we implement executive actions as we've discussed.

MR. DIAZ-BALART: How long will it take? Because a lot of people are asking. They said, we were 24 hours away from registering for the expanded DACA and just months from DAPA. This happens 12 hours before. What's going to happen now? How long is it going to take? And, again, a lot of the questions are, was the President caught by surprise? And why is it taking so long? This is what we're getting, Mr. President.

THE PRESIDENT: What I'm saying is, is that of course we weren't surprised. I've got a bunch of lawyers, we saw the judge who was rendering the opinion. The fact that we weren't surprised doesn't mean we can stop the judge from rendering an opinion. It means that we then go forward in the appeal process. That's how the legal system works.

And we have asked—first and foremost, we have asked for a stay. What a stay means, by the way, for the non-lawyers, is simply that whatever the judge thinks, it shouldn't stop us from going ahead and implementing. The first step is to go before that same judge and say, judge, what you said is wrong, rethink it. He may not agree with that.

The next step is to go to a higher court, the Fifth Circuit. That will take a couple of months for us to file that and argue that before the Fifth Circuit. We expect to win in the Fifth Circuit, and if we don't, then we'll take it up from there.

So at each stage, we are confident that we've got the better argument. As I said before, what I've done is no different than what previous Presidents have done. In the meantime, what I can do is make sure—

MR. DIAZ-BALART: The numbers are unprecedented.

THE PRESIDENT: Well, the numbers are unprecedented only relatively speaking. I mean, if you look at what George H.W. Bush did, he, proportionally to what was then the immigrant population, was very aggressive in expanding. The difference is, is that Democrats didn't challenge what he did for largely political reasons.

MR. DIAZ-BALART: And there was a bill already underway.

THE PRESIDENT: Well, there was a bill underway, but in some ways, you could make an argument that since a bill had passed that didn't solve that problem, Congress had been very direct in saying we don't want to solve that problem. And he went ahead and did it anyway, because it's in his authority to implement, using prosecutorial discretion, the limited resources of Department of Homeland Security.

So we're going to be in a position I think of going through the legal process over the next several

months. In the meantime, what people who would qualify for executive action should be doing is gathering up your papers, making sure that you can show that you are a longstanding resident in the United States. You should be making sure that you've got the documents so that when we have cleared out all the legal problems and the application process is ready to go, that you're ready to go.

And we've got wonderful advocates who are working with us all across the country, in communities, the churches, civil groups and organizations, civil rights groups, lawyers, advocates. So the community right now, what they can do is prepare so that as soon as the legal process has worked themselves through, we can go forward.

MR. DIAZ-BALART: Mr. President, I want to introduce you to Boris Gills (ph). He is a student here at Florida International University. Born in Haiti.

Good afternoon.

Q Hello, Mr. President. My name is Boris Gills (ph), and I'm an international student. I came from Haiti. And I'm a survivor of the earthquake that badly ravaged my country in 2010. In 2011, I came here in the U.S. on a student visa. Now, I'm a senior at FIU. I'm graduating next semester with a double major in finance and international business. Like so many of us international students, we don't know what to do. Our back against the wall. We're doing everything by the book, but yet it feels like we're left out of every single reference, of everything going on. So now my

question is, what is it that you can do to help us international students? How can you include us in your executive orders, maybe? (Applause.)

THE PRESIDENT: Well, let me just say this. It's wonderful to see people, young people, talented, from all across the globe coming to stay in the United States. And I want to congratulate Florida International for the diversity of its class and the great work that it's doing. And we would love more really well-educated, ambitious young people to want to stay here and contribute to this country.

If you look at the history of the founders of Intel and Google and so many of our iconic companies, people like Albert Einstein, Alexander Graham Bell, they were immigrants. And one of the mistakes that we're making right now is we're training a lot of incredibly talented young people, they're going to our universities, getting advanced degrees, and then we're sending them back right away, even though they may want to stay and start businesses here and contribute to our community.

So one of the things that we talked about in the comprehensive immigration bill was how can we provide greater incentives and opportunities for young people with great talent and higher degrees to be able to stay here—particularly in areas like math and science and technology, where we know that right now we don't have enough engineers, we don't have enough computer scientists.

But that is not something that we can do aggressively through executive actions. That's something that's going to require legislation for us to do. And, frankly, there's going to be a—I want to be very clear, there are a lot of foreign students who come here to study. The fact that they come here to study doesn't automatically qualify them for legal residence or U.S. citizenship. And I don't foresee a circumstance where suddenly anybody who is going to college here automatically is qualified for legal residence. There will be criteria in terms of who it is that is able to apply, get legal residence, get a work permit, and maybe ultimately go through citizenship. But that's going to be through a legal process of legal immigration. That's not going to be one that is resolved with respect to somebody who has been undocumented. Those are two different circumstances.

And part of what we can do through the comprehensive immigration bill is speed up our legal immigration system. A lot of people end up being forced through the undocumented pool because the legal process is so bogged down, so bureaucratic, so slow, oftentimes the allocations of quotas from different countries don't reflect the modern world. And so one of the things that the Senate bill originally did was really change that in a smart way and it would have speeded things up. That's why we still have to get this bill passed and we're still going to have to put pressure on it.

MR. DIAZ-BALART: On a bigger question that kind of Boris brings up, to extrapolate his case, is some people wonder, well, are you focusing mostly on the

undocumented population? And through executive orders, could you not also include those that are here, that are participating already? Folks that came from Haiti, this horrible earthquake that hit five years, are you focused at all on that? I think Boris's question is, can't you include them as well to streamline in some way? (Applause.)

THE PRESIDENT: Here's the thing. I was always very clear about this, even when I made the first announcement about the executive actions. The reason I'm confident about our legal position in what we did with DACA, which was already in place since 2012, what we're now proposing in terms of expanding DACA, and also for the parents of those who qualified for DACA—the reason I'm confident is that we could take those steps under my powers of prosecutorial discretion.

If, in fact, we were completely just rewriting the immigration laws, then actually the other side would have a case, because we can't violate statutes. We can't violate laws that are already in place. What we can do is make choices to implement those laws. That's what we've done with DACA and that's what we've proposed with the expansion of DACA and DAPA.

In order for us to do most of the work that Boris refers to in terms of expanding opportunities, for example, to say to any young person who has got an advanced degree in math and science and engineering, which we know we're going to need, even as we try to get more and more young Americans to go into those fields—in order for us to do that, we're going to need a congres-

sional law to be passed. I don't have all the authorities that are necessary in order to get some of those things done.

MR. DIAZ-BALART: Mr. President, I can't tell you the amount of questions that we've received, both on Telemundo and MSNBC. has really been extraordinary. And one I get a lot, over and over and over again, is a question, Mr. President, when you had absolute control of Congress, you really didn't fight for immigration. And then when you had the situation where you lost majorities, then you take action. Is there political implications behind something that affects so many people so close to their hearts?

THE PRESIDENT: I don't know if anybody remembers, José, that when I took office and I had a majority, we had the worst financial crisis since the Great Depression. (Applause.) The global economy was collapsing. The unemployment rate in the Latino community and the immigrant community had soared. People were losing homes and entire communities were being devastated. So it wasn't as if I was just sitting back, not doing anything.

MR. DIAZ-BALART: No one says you were sitting back not doing anything—but you did do the ACA, for example.

THE PRESIDENT: We were moving very aggressively on a whole host of issues. And we moved as fast as we could and we wanted immigration done. We pushed for immigration to be done. But, ultimately, we could not get the votes to get it all done.

Now, this is one of the challenges of being President, is there are crying needs everywhere. Even within the Latino communities, even within the immigrant communities, there are crying needs. I don't regret having done the ACA. I just described for you there are millions of people who are not going to go bankrupt because they got sick because we got that done. So if the question is, would I have loved to have gotten everything done in the first two years—absolutely, because then, for the next six, I could have relaxed. (Laughter.)

But what we do is we choose to push as hard as we can on all fronts. Some things are politically easier. Some things are politically more difficult. Some things we're able to get done given the schedule in the Senate or in the House.

One of the biggest challenges that we had on a lot of these issues was what's called the filibuster in the Senate. Even when we had a majority in the Senate, in order to get things passed, we had to get some Republican votes. And if it were not for that filibuster process where—by the way, it's not in the Constitution, but the habits in the Senate have gotten so bad where you've got to get 60 votes for everything. As a consequence of that, things like immigration reform, that if I had just needed a simple majority of Democrats we could have gotten done, we could not get done in those circumstances.

MR. DIAZ-BALART: And here's another social media question. Benson Owen from Houston says: Why did Democrats and the GOP play political Ping

Pong with immigration when millions of American families suffer as a result? (Applause.)

THE PRESIDENT: José, wait, wait, wait. I appreciate the applause. Let me just say, that's just not true—the notion that Democrats and Republicans played political Ping Pong. (Applause.)

Democrats have consistently stood on the side of comprehensive immigration reform. (Applause.) Democrats have provided strong majorities across the board for comprehensive immigration reform. And you do a disservice when you suggest that, ah, nobody was focused on this, because then you don't know who's fighting for you and who's fighting against you.

And the fact of the matter is that the Democratic Party consistently has, in its platforms, in its conventions, has taken a strong stand that we need to fix a broken immigration system. And the blockage has been very specific on one side.

Now, to their credit, there are Republicans, a handful, who have agreed with us. That's how we got it passed through the Senate. But let's not be confused about why we don't have comprehensive immigration reform right now. It's very simple: The Republican Speaker of the House, John Boehner, refused to call the bill. Had he called the bill, the overwhelming majority of Democrats and a handful of Republicans would have provided a majority in order to get that done. (Applause.)

MR. DIAZ-BALART: Mr. President, I want to kind of—as I look out to the many folks that are here, there

are so many DREAMers here. Astrid Silva is here. She has a family member in the process of deportation. You actually highlighted her case when you mentioned your executive action. Erika Andiola is here, and she has a question that many DREAMers have, as well.

Q Hi, Mr. President. I'm a DREAMer from Arizona, the state where Sheriff Arpaio and ICE usually criminalize our communities. And my sister is here who actually qualifies for DACA extended, or would have qualified if it was implemented. And my mom is also here. She was, unfortunately, left out of your executive actions and she doesn't have any citizen children; she only has DREAMers as children. And she is also in deportation proceedings. And because of a previous deportation that she did have and came back for us, she's actually a priority in your deportation directive.

And so my question to you is, what's going to happen to my family? Given the fact that immigration reform, it's not going to happen any time soon, and we know that because of the politics in Congress—what's going to happen in the meantime with my mom and my family if immigration comes to my house once again?

THE PRESIDENT: Well, let me just say, I don't know, obviously, the details of every specific case, and I'm happy to have somebody look at the case that you just referred to and what's going on with your mom and your sister. What we've done is we've expanded my authorities under executive action and prosecutorial discretion as far as we can legally under the exist-

ing statute, the existing law. And so now the question is, how can we get a law passed.

Now, that's heartbreaking, because it means that not everybody is immediately helped. But the fact of the matter is that until that law is changed, what we have to do is to prioritize under the existing law. And what we then have to do is try to get this legal case resolved.

But, look, this is something that I wrestle with every single day, and that is that there are laws on the books that I think are counterproductive. I think there are laws on the books that I don't think are right in terms of making sure that America is strong. But I have to deal with a Congress that—a big part of which disagrees with me. I've got to deal with judges who may not have been appointed by me and have a different reading of the law. And so what we have to do is just keep on working.

But the one thing that I have to just say to everybody here—every major social movement, every bit of progress in this country—whether it's been the Workers' Rights Movement, or the Civil Rights Movement, or the Women's Rights Movement—every single bit of that progress has required us to fight and to push. And you make progress, and then you don't get everything right away, and then you push some more. And that's how the country continually gets better. Precisely because the stories of people like you—that, then, hopefully, softens the hearts of people who right now are blocking us from solving some of these problems.

And that is going to be something that we just have to continue to work on. That's the nature of it.

MR. DIAZ-BALART: (As interpreted.) Mr. President, a lot of people ask themselves and this is Astrid's case, and Erika's as well—a lot of DREAMers think the same way—if you have executive actions and judges have to determine at the end if they are legal or not, how come you don't include the parents, the parents of the DREAMers? If the judge says, well, that's not legal, I find it not constitutional, so then you deal with it. But please include them.

THE PRESIDENT: Because the theory of prosecutorial discretion is that you have limited resources, and because of that, you can't apply the law of enforcement to everybody. But if I include everybody, then it's no longer prosecutorial discretion, then I'm just ignoring the law. And as I said before, then there really would be a strong basis to overturn everything that we've done.

So that's why, ultimately, the law itself is going to have to be changed. In the meantime, what we have to do is make sure that we're continually fighting to uphold what we've already done. I mean, we've got 800,000 people who are currently taking advantage of DACA, including the young woman who just spoke, from what I understand. And now we've got to get more. But ultimately, in order to make sure that we don't have any heartbreaking stories with respect to immigration, then we have to fix the law.

There are only so many shortcuts. Ultimately, we have to change the law. And people have to remain focused on that. And the way that happens is, by the way, by voting. (Applause.) I mean, I just have to say, in the last election—and I want to speak particularly the young people here—in the last election, a little over one-third of eligible voters voted. One-third!

Two-thirds of the people who have the right to vote—because of the struggles of previous generations, had the right to vote—stayed home. I'm willing to bet that there are young people who have family members who are at risk of the existing immigration system who still didn't vote.

MR. DIAZ-BALART: Mixed-status families. There are millions of them.

THE PRESIDENT: Who still did not vote. And so my question, I think, to everybody—not just to the immigrant community, but the country as a whole—why are you staying at home? (Applause.) Why are you not participating? There are war-torn countries, people full of poverty, who still voted, 60, 70 percent. If here in the United States of America, we voted at 60 percent, 70 percent, it would transform our politics. Our Congress would be completely different. We would have already passed comprehensive immigration reform. (Applause.) It would have already been done.

So I, as President, have the responsibility to set out a vision in terms of where we need to go. I have the

responsibility to execute the laws faithfully, and that includes making sure that what's within my power I am doing everything I can to make the immigration system smarter. But everybody here and everybody watching also has responsibilities. And one of those responsibilities is voting for people who advocate on behalf of the things that you care about.

And staying home is not an option. And being cynical is not an option. And just waiting for somebody else —whether it's the President, or Congress, or somebody —José—to get it done, that's not enough.

MR. DIAZ-BALART: (As interpreted.) What happens, Mr. President, is some people see what's going on in Washington and they see that one party says something and the other party says something else, and they don't do what they say that they're going to be doing. Why am I—this is just a game.

THE PRESIDENT: It's not a game. Wait, wait, wait—

MR. DIAZ-BALART: And that happens while people are being deported. Every day. More than 2 million people.

THE PRESIDENT: Let me tell you something. This is not a game.

MR. DIAZ-BALART: No, I agree with you. But I'm telling you why people feel cynical.

THE PRESIDENT: They shouldn't feel that way, because all kinds of changes happen when people vote. There are people who have health insurance right now

because somebody went out there and voted. There are people right now who had their homes saved —otherwise they would have lost them—because people voted. There are people right now who are going to college because we were able to expand student aid and Pell Grant programs. That happened because people voted. All kinds of changes have taken place over the last six years that have made this country better because people voted.

Now, the fact that we didn't get 100 percent of what we want—you never get 100 percent of what you want. You have to go out there and fight for the rest. (Applause.)

And we've made enormous progress, but we have more to do. And that's what I intend on doing in the remaining two years that I've got as President. (Applause.)

MR. DIAZ-BALART: (As interpreted.) I am very happy that we are discussing this political topic, Mr. President, because one of the main contenders for the 2016 elections is a former governor from this particular state, Jeb Bush. He said last week that you overstepped your authority, and as a consequence you hurt the effort to find a solution to the immigration problem, and all the affected families deserve something better.

No matter who wins the White House after the next elections in 2016, what's your main concern? Knowing that you won't be able to fix before you leave in regards to immigration, when you leave office, what

would be the message for the next President that will be living in the White House after the 2016 elections?

(In English.) I can do this in English now.

THE PRESIDENT: No, no, no, I got the translation. (Laughter.)

MR. DIAZ-BALART: We're bilingual here. I'm bilingual.

THE PRESIDENT: Well, let me make a couple of points. Number one, I haven't given up on passing it while I'm President. (Applause.) We're going to keep on pushing. And although, so far, the Republican Party has been pretty stubborn about this issue, if they start feeling enough pressure, that can make a difference. And so we just have to keep the pressure. Don't suddenly just let up, say, well, we just got to wait for the next two years, or we got to wait for a judge. We got to keep on putting pressure on members of Congress—Republican and Democrat.

If there are Democrats out there who aren't on board on comprehensive immigration reform—although the vast majority of Democrats are on board—but if there are some who aren't, go talk to them. Push them. I'm not going to just stand still over the next two years. We're going to keep on trying to get something done. So that's point number one.

Point number two: I appreciate Mr. Bush being concerned about immigration reform. I would suggest that what he do is talk to the Speaker of the House and the members of his party. (Applause.) Because the fact of the matter is that even after we passed biparti-

san legislation in the Senate, I gave the Republicans a year and a half—a year and a half—to just call the bill. We had the votes. They wouldn't do it. And then the notion that, well, if you just hadn't taken these executive actions, if you hadn't done DACA, maybe we would have voted for it—well, that doesn't make any sense. That's an excuse.

MR. DIAZ-BALART: Yeah, but they're saying

THE PRESIDENT: That's an excuse. (Applause.) Now, let me get to the broader question that you asked, which is, what would I ask for the next President of the United States. One of the things I've learned in this position is that as the only office in which you're the President of all the people, not just some, you have to be thinking not just in terms of short-term politics, you have to be thinking about what's good for the country over the long term.

Now, over the long term, this is going to get solved, because at some point there's going to be a President Rodriguez, or there's going to be a President Chin, or there's going to be a—(applause)—the country is a nation of immigrants, and ultimately, it will reflect who we are, and its politics will reflect who we are. And that's not something to be afraid of. That's something to welcome. Because that's always been how we stay dynamic and stay cutting-edge, and have energy and we're youthful.

So what I would say to the next President is: Think ahead. Don't say something short term because you think it's politically convenient, and then box yourself

in where you can't do what's right for the country. Think long term.

And what we know is, long term, if you pass a broad-based, thoughtful, comprehensive immigration reform that makes the legal system smoother, that invites talented young people to stay here and work and invest and start businesses; if we provide a pathway to citizenship for those who have been here a long time; if we strengthen our borders; if we make sure that we're saying to companies, don't take advantage of undocumented workers by not paying them overtime, not paying them minimum wage—if we do all those things, we know the deficit will go down, economic growth will go up. We know that we can then really concentrate our resources effectively on our national security.

Every economist who's looked at this says it's the right thing to do. The vast majority of businesses recognize it's the right thing to do. So think ahead. That's what I'd say to the next President of the United States.

And if you hear people during the course of the future campaigns, over the next several months and into next year, if all they're doing is demagoging—if all they're saying is, "we have to do something about these illegal immigrants," but then when you ask them, okay, what is it that you want to do, then they don't have a good answer, or they pretend that we're going to somehow deport 11 million people, even though everybody knows that the economies of Miami, New York, Chicago, the entire Central Valley in California would collapse—(applause)—so they're not being serious

about it—if you hear people not being serious and not being honest about these issues, then you got to call them on it.

But they'll ignore you if they don't think you're voting.

And so it doesn't do any good to push candidates but not then back it up with action. And the action, ultimately, is going to be getting engaged and involved in the political process. The people who are least likely to vote are young people. So, young people, you need to think ahead, too. (Applause.) When we work on these issues, most of us—I'm going to include José in the category of being old.

MR. DIAZ-BALART: We're the same age—

THE PRESIDENT: He looks a little better because I don't dye my hair. (Laughter and applause.)

MR. DIAZ-BALART: I know. It's called the "Obama."

THE PRESIDENT: No, no, man, that's not true. (Laughter.)

But the fact is, is that we're going to be okay. The question is what's happening for the next generation. You have to vote. You have to get involved now. Even if everything seems like it's okay for you now, you got to be thinking about the future.

And that's part of what has always been the great strength of America—we dream about the future. That's what brings immigrants here, is we're future-oriented, we're not past-oriented. The people who are interested in looking backwards, they stay where

they are. They're comfortable. They don't want change. Even if there's an earthquake in Haiti, they still stay where they are. Even if there's poverty where they live, they stay where they are. Even if their religious faith is being discriminated again, they stay where they are.

But if you come to America, it's because you believe in the future, and that has to be reflected in our politics.

MR. DIAZ-BALART: Señor Presidente, gracias.

THE PRESIDENT: Muchas gracias. (Applause.) Thank you.

END
4:43 P.M. EST

CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Dec. 2, 2014—Final

House Homeland Security Committee Holds Hearing on President Obama's Immigration Executive Action Order

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The goal is to encourage these people, who are now working off the books—and we do have undocumented immigrants in this country working off the books—to get on the books, pay taxes into the federal treasury, pursuant to a work authorization.

The assessment is that that will not impinge upon American jobs with American workers.

BARLETTA:

Mr. Secretary, is it true that the illegal immigrants who are granted amnesty will not need to comply with the Affordable Care Act?

JOHNSON:

Those who are candidates for and are accepted into the deferred action program will not be eligible for . . .

BARLETTA:

So therefore an employer . . .

(CROSSTALK)

BARLETTA:

So therefore an employer may have an —may have a decision to make. Do I keep the American worker

and provide health insurance or pay a $3,000 fine, or do I get rid of the American worker, and hire someone who I do not have to provide health insurance and I won't get fined?

Is that a possibility?

JOHNSON:

I don't see it that way.

BARLETTA:

You don't think any employers will see it that way?

JOHNSON:

I don't think—I don't think I see it that way. No. No, sir.

BARLETTA:

Following the 9/11 Commission report, the commission staff issued a report on terrorist travel that made connections between enforcement of our immigration laws and national security.

On page 98 of that report, it describes how terrorists would benefit from any form of amnesty. The report recognized that terrorists in the '90s as well as the September 11th hijackers needed to find a way to stay in or embed * * *

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